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NO. _____

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1986

TEXAS STATE COMMISSION FOR THE BLIND
AND THE STATE OF TEXAS,
Petitioners

V.

THE UNITED STATES OF AMERICA,
Respondents.

On Petition For Certiorari To The
United States Court Of Appeals For
The Federal Circuit

APPENDIX TO PETITION FOR CERTIORARI

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APPENDIX A

UNITED STATES COURT OF APPEAL FOR THE FEDERAL CIRCUIT

TEXAS STATE COMMISSION FOR THE BLIND AND STATE OF TEXAS, *Appellees,*	)	
v.	)	**Appeal No. 85-1954**
THE UNITED STATES, *Appellant.*	)	

DECIDED: June 26, 1986

Before MARKEY, *Chief Judge*, FRIEDMAN, RICH, DAVIS, BALDWIN, SMITH, NIES, NEWMAN, BISSELL and ARCHER, *Circuit Judges.*[1]

NIES, *Circuit Judge.*

The United States appeals from the judgment of the U.S. Claims Court[2] holding the United States liable under the income-sharing provisions of the Randolph-Sheppard Act, 20 U.S.C. §§ 107-107f (1982), to the Texas State Commission for the Blind and the State of Texas (collectively hereafter, TSCB) for income derived from vending machines operated by the military exchanges of the Department of Defense. We reverse.

I.

This appeal involves a question of statutory interpretation of the Randolph-Sheppard Act (the Act). More precisely, the issue is whether a regulation of the Department of Defense (DOD) reasonably interprets the scope of the statutory

1. The appeal was originally heard by a panel of this court. Subsequently, one member of the panel retired and the court voted to decide the case in banc. Our jurisdiction rests on 28 U.S.C. § 1295(a)(3) (1982).

2. 6 Cl. Ct. 730 (1984).

exemption provided for military exchanges from the requirements of the Act that income from vending machines on federal property be shared with blind vendors and/or state blind agencies.

In 1936, Congress passed the Randolph-Sheppard Act, Ch. 638, 74 Stat. 1559 (1936) (current version at 20 U.S.C. §§ 107-107f (1982)), to provide blind persons with remunerative employment and economic opportunities by permitting them to operate vending stands in federal buildings. The program was only moderately successful. Part of the problem was general apathy to the program among the agencies. In addition, civilian employee welfare and recreation groups were being permitted by agencies to place vending machines in federal buildings to finance the activities of such groups. The competition from these machines diverted income from blind vendors and made the establishment of new vending stands economically unattractive.

The practice of allowing employee groups, such as unions, to utilize federal property free of charge and to retain the funds without any accountability was of questionable legality. In 1952, the Comptroller General issued an opinion advising the Attorney General that funds derived from vending machines at the Federal Bureau of Investigation were received "for the use of the United States" within the meaning of that phrase in 31 U.S.C. § 484 and were required to be deposited into the Treasury as miscellaneous receipt. Comp. Gen. Dec. B-111,086, 32 Comp. Gen. 124 (1952). In view of that opinion, the Comptroller General, in a related opinion that year, ruled that the practice of allowing postal employee groups to install vending machines on federal property and retain the profits was of "doubtful" legality. However, the Comptroller General concluded that his office would "interpose no objection to the continued use of proceeds by employee groups" pending action on clarifying legislation which the Controller General had recommended to Congress.[3]

In 1954, Congress amended the Randolph-Sheppard Act to make it more effective. Amendments to the Randolph-Sheppard

3. Comp. Gen. Dec. B-112,840, 32 Comp. Gen. 282 (Dec. 10, 1952). The proposed legislation was never passed.

Vending Stand Act Pub. L. No. 83-565, § 4, 68 Stat. 663 (1954). These amendments mandated that blind vendors be given a "preference," so far as feasible, in establishing new stands on federal property and authorized the heads of agencies to assign vending machine income to blind vendors with whom vending machines directly competed in order to assure such "preference." However, it appears that the assignment of income power was virtually ignored. In 1962, Senator Randolph, in proposing further amendments to improve the opportunities for the blind, specifically recognized that vending machines of civilian employee groups were the source of the problem and urged that such groups could and should find "other means of financing [their] projects." *Operation of Vending Stands for the Blind in Federal Buildings: Hearing on S. 394 Before the Special Subcomm. of the Senate Comm. on Government Operations,* 87th Cong., 2d Sess. 10 (1962).

In 1974, over strong opposition by civilian employee groups, particularly the Postal Workers Union, significant changes were made in the Act because of continued congressional dissatisfaction with the limited expansion of the blind vendor program. Randolph-Sheppard Act Amendments, Pub. L. No. 93-516, Title II, 88 Stat. 1622 (1974). These amendments were in large part, again, the result of the efforts of Senator Randolph and included provisions by which blind vendors were given "priority" (not merely a preference) in operating new facilities so as to increase their numbers; the items allowed to be sold were expanded; and income from vending machines—with some exemptions—were required to be shared either with blind vendors directly or with state agencies for the blind. The sharing percentages are 100% for machines in direct competition with blind vendors; 50% where there is no direct competition unless at least half of the hours worked on the premises where the machines are located are outside normal working hours; and 30% in the latter case. 20 U.S.C. § 107d-3(b)(1) (1982).

The exemption provided in the 1974 amendments, which concerns us here, is found in 20 U.S.C. § 107d-3(d) (1962) and provides:

> Subsections (a) and (b)(1) [income sharing] of this section shall not apply *to income from vending machines*

> *within retail sales outlets under the control of exchange or ships' stores systems* authorized by title 10, or to income from vending machines operated by the Veterans Canteen Service, or to income from vending machines not in direct competition with a blind vending facility at individual locations, installations, or facilities on Federal property the total of which at such individual locations, installations, or facilities does not exceed $3,000 annually. [Emphasis added.]

A DOD regulation, 32 C.F.R. § 260.3(i)(3)(i) (1985), interprets this exemption to exclude:

> Income from vending machines operated by or for the military exchange or ships' stores systems.

A number of state agencies, TSCB being one, nevertheless, sought to share in the income of military exchanges. In May, 1979, TSCB filed a complaint with HEW which resulted in the convening of an arbitration panel, as provided in the statute (20 U.S.C. § 107d-1(a) (1982)), to adjudge the validity of its asserted right to a share of vending machine income of the military exchanges. TSCB argued that the statutory exemption covered only those vending machines of the military exchanges physically located within the four walls of military exchange stores.

In a split decision, the arbitration panel of three held that the position of TSCB was the correct interpretation of the statute. *Texas (Texas State Commission for the Blind) v. Department of Defense,* No. TD 70-4 (Sept. 2, 1981). The majority of the arbitrators stated that the statutory language did not "appear to be ambiguous." Slip op. at 11. "Within retail sales outlets," per the two arbitrators, would normally be understood to mean "inside the four walls of an exchange system store." They then recognized that "within" could also mean "a part of" but concluded that this would render the phrase "retail sales outlets" meaningless. Slip op. 11-12. On the other hand, the unequivocal legislative history against reaching income of the military exchanges raised questions in their minds as to the "clarity" of the language. Slip op. at 12.

Ultimately, the two arbitrators resolved the question of the scope of the military exemption by reliance "on the general intent and approach of the legislation itself. These facts argue for a narrow reading of any limitation on opportunities for the blind." Slip op. at 15. To be exempt, they concluded, vending machines had to be "within the four walls of an exchange system store" but "expressly [did] not decide the issue of whether vending machines directly outside retail sales outlets are to be deemed inside or outside these stores." Slip op. at 18 and n.27. The majority found final support for its position in regulations of the Department of Health, Education and Welfare (HEW), the principal agency under the Act charged with its administration. The majority did not rely on specific language in the HEW regulations (the regulations simply repeat the statute), but on HEW's refusal to amend its regulations to include the broad exemption language requested by DOD. Slip op. at 16-17.

The dissenting arbitrator, in reaching his conclusion that DOD's position was correct, relied on the essentially different nature of the military exchanges from civilian employee welfare and recreation groups. Through the profits generated by military exchanges, essential governmental support services were provided for military service personnel and their families. He noted that extracts from Congressional Hearings and Reports of record dated 1949, 1953, 1970, 1972, 1974, 1978 and 1979 on non-Randolph-Sheppard legislation established that this arrangement had been recognized and approved by Congress as mutually beneficial to service personnel and to the public fisc. In his view, the legislative history unequivocally indicated that the military exchange systems were intended to be exempt and that that purpose could be given effect without a strained reading of the words of the statute.

In the minority arbitrator's view, the statutory language had no "plain meaning." Indeed, TSCB had conceded that the statutory words "retail sales outlet" and "within" were susceptible to more than one interpretation, and the majority opinion had expressly left open the question whether vending machines directly outside exchange stores should be deemed "within" such stores under the statute. The "plain language" of the statute seen by the majority, in his words, "turned out not

to be so plain."

Following the decision of the arbitration panel, on September 2, 1981, TSCB sought to obtain enforcement of the arbitration decision by the Department of Education (DOE), which had succeeded to HEW's authority under the Randolph-Sheppard Act. Act of October 17, 1979, Pub. L. No. 96-88, Title VI, 93 Stat. 696. In the interim, the State of Oklahoma had initiated litigation in federal district court against DOD on a comparable claim to military exchange income.[4] Because of the conflict between the interpretations of the statute by two government departments (DOE and DOD), DOE referred the matter to the Department of Justice for resolution, as required by Executive Order No. 12,146, 3 C.F.R. § 409,411 (1980). On February 1, 1982, the Department of Justice advised that it resolved the conflict in favor of DOD. Therefore, the Department of Justice undertook to defend the Oklahoma suit on the basis of DOD's interpretation.

The decisions in the Oklahoma litigation are reported at *Oklahoma v. Weinberger,* 582 F. Supp. 293 (W.D. Okla. 1982), *aff'd,* 741 F.2d 290 (10th Cir. 1983). In sum, those courts held that the statutory language was not without some ambiguity as evidenced by the changes in HEW's position during the drafting of its own regulations.[5] In their view, the proposed narrow interpretation was contrary to the intent of Congress, since limiting the exemption to vending machines physically within exchange stores would effectively deprive the exchanges of any exemption. On the other hand, the DOD regulation, endorsed by the Department of Justice, was consistent with the statutory language, the purpose of the exemption, and congressional intent in the overall purpose of the Act. Thus, both the Oklahoma district court and the 10th Circuit held DOD's regulation valid.

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4. Oklahoma had filed an arbitration complaint more than a year before. The district court did not require exhaustion of administrative remedies because of the delay and the government's interposing of no objection. *Oklahoma v. Weinberger,* 582 F. Supp. 293, 294 n.2 (W.D. Okla. 1982).

5. We note that the Tenth Cirucit, in affirming summary judgment, specifically quoted the district court's finding that the language was "ambiguous," 741 F.2d at 292.

The suit by TSCB, seeking enforcement of the arbitration award in its favor, was filed in the United States Claims Court in March, 1983. The Claims Court rendered its decision, upholding the award, after the 10th Circuit decision, thereby creating a clear conflict in interpretation.

The Claims Court's decision turned particularly on the meaning of the statutory term "within." The common usage of the term, per the court, "contemplates spatial boundaries." 6 Cl. Ct. at 738. The court discounted the significance of the legislative history relied on by the 10th Circuit since the Claims Court considered the history to be "at odds" with the concept of "within physical boundaries." 6 Cl. Ct. at 740. A particular colloquy on the House floor between Messrs. Brademas and Sikes (which specifically supports DOD's interpretation) was discounted because it occurred after the Senate passed the bill and could not have been considered by that body.[6] *Id.* at 741. The Claims Court viewed other portions of the legislative history as supporting TSCB's position because of the use of the words "retail outlet" therein which, in its understanding, meant a store.[7] *Id.* at 740. The court also noted the Conference Report characterizing the exemption as excluding "certain locations." *Id.* citing S. Rep. No. 1270, 93rd Cong., 2d Sess. 35 (1974); H.R. Rep. No. 1457, 93rd Cong., 2d Sess. 35 (1974). Further, the legislative history's reference to the Marine Corps base in Albany, Georgia, as a "model" because of the number of blind vendors was seen to overcome DOD's argument that the income-sharing provisions were directed to the civilian groups only. 6 Cl. Ct. at 741.

Finally, since the majority of vending machines on DOD-controlled property are operated by the exchange system, the congressional purpose of the act would be frustrated, per the Claims Court, if these were exempt. To avoid "nullifying" the statute, the court ruled in favor of TSCB. *Id.* at 741-42.

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6. That the Claims Court was incorrect on this point is analyzed *infra.*

7. The court quoted from the Senate Report, S. Rep. No. 937, 93rd Cong., 2d Sess 21 (1974), "Subsection (d) provides that the assignment of income provisions of subsections (a) and (b)(1) do not apply to vending machine income from military exchange retail outlets" and a similar passage, S. Rep. No. 937 at 30.

The court certified the question of statutory interpretation to this court which accepted jurisdiction.[8]

Upon consideration of the statutory language, the legislative history, the purpose of the exemption, and the status of the military exchanges as non-appropriated fund instrumentalities performing essential governmental services, we conclude that the Claims Court erred in voiding the DOD regulation.

The task before us of interpreting the statutory language of the military exchanges exemption is succinctly summarized in *United States v. Turkette*, 452 U.S. 576, 580 (1981):

> In determining the scope of a statute, we look first to its language. If the statutory language is unambiguous, in the absence of the contrary, that language must ordinarily be regarded as conclusive." *Consumer Products Safety Comm'n v. GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980). Of course, there is no errorless test for identifying or recognizing "plain" or "unambiguous" language. Also authoritative administrative

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8. Faced with the 10th Circuit decision, TSCB sought to prevent the government from raising any legal question attacking the merits of the award. TSCB contended that the Claims Court lacked "jurisdiction" to consider such a defense for two reasons: (1) the Act provides for a right to appeal from an arbitration award only specifically in favor of the claimant, and (2) alternatively, the government's challenge should be considered barred by a statute of limitations.

We need not decide whether the U.S. could have taken an appeal from the award. The issue is whether the presence of a specific provision in the Act allowing appeal by the claimant bars the U.S., by implication, from defending against enforcement of the award on the ground that the award is not authorized that it does not. With respect to the assertion of a bar based on a state of limitations, none is applicable here against the United States. *United States v. Summerlin*, 310 U.S. 414, 416 (1940) (United States is not bound by state statutes of limitations); *Guaranty Trust Co. v. United States*, 304 U.S. 126 (1938) (United States is not bound by federal statutes of limitations unless their terms specifically so provide). Finally, TSCB makes no argument that the government is improperly making a collateral attack on the arbitration award. In this connection, we note that the parties agreed before the arbitration panel that "the meaning of the exemption will be finally resolved by the courts." Accordingly, we hold that the Claims Court properly considered the issue of the legality of the award under the statute.

> construction should be given the deference to which they are entitled, absurd results are to be avoided and internal inconsistencies in the statute must be dealt with. *Trans. Alaska Pipeline Rate Cases,* 436 U.S. 631, 643 (1978); *Commissioner v. Brown,* 380 U.S. 563, 571 (1965).

In this case, the statement of the difficulty in identifying "plain" or "unambiguous language" is particularly apropos. Whether or not words of a statute are clear is itself not always clear. Even if the "common" understanding of "within retail sales outlets" were physically within the walls of a store, as the Claims Court held, that does not make the subject phrase "plain" or "unambiguous." The determination of what usage of particular words is *common* must be rejected as an "errorless test."

Moreover, even where a statute is clear on a purely linguistic level, interpretation may be necessary if that interpretation does not do justice to the realities of the situation. As stated by the Supreme Court in *Church of the Holy Trinity v. United States,* 143 U.S. 457, 459 (1892), it is a "familiar rule that a thing may be within the letter of the statute, but not within its spirit nor within the intention of its makers." *See also United States v. Riverside Bayview Homes, Inc.,* 106 S. Ct. 455, 461 (1985) (argument that it is "unreasonable to classify 'land,' wet or otherwise, as 'waters' " is "simplistic.")

Finally, the question in this case is not what interpretation this court would give to the statute were it the executive branch. The issue to be decided by this court is whether the statute is capable of more than one interpretation and whether the agency's interpretation is reasonable.

With these premises in mind, we turn to the statutory analysis.

III.

The arbitration award represents an amount estimated to be in excess of $10 million which must be paid from DOD current funds for *essential* government services for the military and

their families. The brief review of legislative history noted above indicates that the funds Congress anticipated would be used for the state agencies for the blind were funds which could be diverted at *no cost* to the government and *no dimuntion* in essential government services. In keeping with that expectation, Congress over a period of 11 years has failed to appropriate any moneys to make up for the loss of exchange funds which the Claims Court held Congress intended to be transferred to the blind.

No rational reason can be advanced to conclude that Congress intended military personnel and their families to support the blind by giving up essential services. Indeed, the whole rationale behind the Claims Court's finding that it had jurisdiction over the claim here shows the special nature of the funds generated by the military exchange systems and differentiates such funds from those of private groups organized by civilian employees, such as employees' unions, which were clearly intended to be diverted to the blind.[9] As indicated, the funds of the latter-type of organizations were being used without any governmental control for whatever group activities their membership wished, such as flowers for the sick, birthday and wedding gifts, band uniforms, scholarships, furnishings for recreation rooms, and general social activities.[10] No funding by Congress can be provided for such activities. In contrast, the only services financed by the funds of the military exchanges are child care centers, libraries, youth activities, gymnasiums,

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9. Some of the legislative history is confusing in that such private organizations of government employees are referred to as "non-appropriated fund instrumentalities" (NAFI). That term has had no single meaning among government agencies. *See Study of Procurement Payable From Nonappropriated Funds*, August 1976. *Cf. L'Enfant Plaza Properties, Inc. v. U.S.*, 668 F.2d 1211 (Ct. Cl. 1982). *See also infra* note 18.

10. *Review of Vending Operations On Federally Controlled Property, Report to the Subcomm. on the Handicapped, Senate Comm. on Labor and Public Welfare, B-176886 37, 43 (Sept. 27, 1973) (hereinafter "GAO Report*). In addition to civilian employee groups, GAO noted competition from minority-owned businesses which were being favored over blind vendors and privately contracted cafeterias in connection with which vending machines were allowed in order to lower prices in the cafeterias. *Id.* at 42; *see also* Letter from General Services Administration to Senator Randolph (Dec. 27, 1973). However, the legislative history makes clear that the activities of civilian employee groups were the primary concern of congress.

arts and crafts facilities and similiar essential support services, which are furnished around the world for military personnel and families. Such services are of a nature for which appropriated funds are also used, indeed, have been provided by yearly Congressional appropriation. The amount of exchange-generated funds is taken into account in determining the amount of the appropriation. Precisely because of this interrelationship, the Claims Court found it had jurisdiction over this claim under the precedent of *United States v. General Electric Corp.*, 727 F.2d 1567, 1570 (Fed. Cir. 1984) and cases cited therein. *Texas State Commission for the Blind v. U.S.*, 6 Cl. Ct. at 737-38.

The Claims Court avoided what it called the "difficult question" which would be raised were additional *appropriated* funds necessary as a result of its judgment (28 U.S.C. § 2517, 31 U.S.C. § 1304) by characterizing the judgment which will result as "in the nature of a refund." 6 Cl. Ct. at 737. Under this theory, the judgment is then payable by DOD from the account which was credited with the revenues collected by the exchanges, or from other appropriated funds used by DOD to fund its morale, welfare and recreational programs.

The concept that the judgment is a "refund" is not only a tortured theory, but also ignores the realities of the judgment. The judgment of the Claims Court would require an immediate cut in essential government services to satisfy the retroactive liability, as well as additional appropriations indefinitely into the future to provide essential government services which otherwise must be reduced. It is unlikely that such a major change in financing for, or in the amount of, military support services would have been undertaken by Congress without serious controversy. *There was none.* Moreover, if the bill were intended to have such an effect, it would have been taken up by appropriate finance and military affairs committees. *It was not.* Skirting these problems, the Senate Subcommittee on the Handicapped, which reported the bill, inserted a last-minute amendment exempting the military exchanges, and the Senate Report states unequivocally that the exchanges were wholly exempt. *See* S. Rep. No. 937, 93d Cong., 2nd Sess. 24 (1974). The House floor debate agreed with the Senate's understanding of the scope of the exemption. *See* 120 Cong. Rec. 35,712 (1974).

The 1973 statement submitted on behalf of *organizations for the blind,* in support of enactment of the 1974 amendments, was limited to the funds of civilian employee groups:

> The mandatory assignment of vending machine revenue would provide substantial sums of *new money* for the achievement of the purpose of the Randolph-Sheppard Act *without creating any hardships* for federal employees. Likewise, the mandatory assignment of this revenue to achieve the purpose of the Randolph-Sheppard Act *would place no burden upon the United States Treasury because the funds in question have not been collected by the government. [Emphasis added.]*
>
> * * *
>
> Over a period of several years, unions of federal employees have been increasingly successful in acquiring the possession and use of revenue from vending machines operated on federal property. This has been accomplished by the *cooperation* and *acquiescence* of the administrative branch of government through the recognition of de facto "employee welfare committees" and "employee welfare funds."

Randolph-Sheppard Act for the Blind Amendments of 1973: Hearings on S.2581 Before the Subcomm. on the Handicapped of the Senate Comm. on Labor and Public Welfare, 93d Cong., 1st Sess. 139 (1973) (statement of representatives of various organizations for the blind).

The funds of such employee groups were attractive targets for diversion. No similar motive existed for reaching the earnings of military exchanges. Diversion of that income to state agencies for the blind would make no economic sense. It would simply be robbing Peter to pay Paul, and then appropriating money for Peter to make up for the transfer.

The government does not argue here that the Randolph-Sheppard Act does not apply to military bases. There is no questions that Congress sought more opportunities for blind vendors on all DOD properties, and other provisions of the 1974

amendments effectively reach DOD.[11] These include expansion of blind opportunities from vending "stands" to vending "facilities," e.g., cafeterias, including rooms with vending machines only; expansion of items to be sold; the granting of a mandatory "priority" in allocating sites rather than merely a "preference" to blind vendors; a requirement for sites for blind vendors in all new or renovated Federal buildings; and, of course, income sharing, which reaches the numerous non-military exchange groups within DOD. At this time, DOD is second only to GSA in implementing the program for the blind both in numbers of sites and in the amount of income turned over to states for their programs.[12]

As initially drafted, that is, before the exemption, the bill amending the Act was so broad that it could be read to cover every vending machine on federal property. The circumstances surrounding insertion of the subsection providing exemptions were not conducive to precision in drafting.[13] The subsection simply appeared in a mark-up of the entire bill put before the January 29, 1974, executive meeting of the Senate Committee on Labor and Public Welfare, Subcommittee on the Handicapped.[14] There was no opportunity for input from other committees or from DOD. The minutes of the meeting, which are in the record, disclose that the *sole* topic of discussion was in continuing controversy with the Postal workers and other unions over diverting funds from their vending machines and

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11. The GAO report as summarized in 6 Cl. Ct. at 732-33 was concerned with the number of blind vendors on DOD facilities, including bases, not with diverting exchange income.

12. The record shows DOD contributed $784,613 to state blind agencies in 1983; $729,471 in 1981. The dissent errs in its assertion that DOD can somehow keep blind vendors off military bases because of the subject exemption. The exemption has no applicability to the mandatory requirement to provide sites for blind vendors.

13. *See infra* note 16 and section IV.

14. The exemption may have been in response to a brief comment by Lieutenant General Benade of DOD during a 1973 hearing, but contrary to the dissent, there is no evidence of a "compromise" with respect to the military exchanges. Even TSCB does not so assert. All evidence is that the exchanges were to be entirely exempt.

what compromise (such as grandfathering) could be worked out to mollify them.

On June 5, 1974, at another executive session, Senator Williams asked the sponsor of the bill, Senator Randolph, to explain it. Senator Randolph said the bill would enable more blind persons to become active so that they would not have to rely on relief or charity. "The moneys that should go to the blind are going to Federal employee unions." He hoped that "an accomodation would be reached with the unions."[15] Senator Dominick asked again "To whom does the income from vending machines now go?" Mr. Robert Humphreys (of the staff) replied, "To the Employee Union Welfare Committees." Since Senator Randolph was the sponsor of the amendments, his explanation and that of the staff cannot be viewed as casual, off-the-cuff comments. The subcommittee was conscientiously restricting itself to reaching only funds of civilian organizations which were being withheld from the Treasury. The compromise worked out with the unions was that the blind would share in the vending machine income earned by private employee groups in exchange for Congress' sanctioning the retention of the balance by such private groups. There was no similar compromise necessary with respect to exchange funds inasmuch as the retention of exchange funds had for years been approved and the exchanges were recognized as official government instrumentalities.[16]

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15. The percentages and the $3,000 exemption became the accommodation finally adopted for these groups.

16. Technically the exchanges and ships' stores systems are not "authorized by title 10" as stated in the statute, but are established by the Secretary of Defense under general authority to regulate the department. Although there were earlier federal court cases dealing with the exchange activities and their employees, the most significant decision is *Standard Oil Company of California v. Johnson*, 316 U.S. 481, 485 (1942), in which the Supreme Court stated, "[W]e concluded that post exchanges, as now operated, are arms of the government deemed by it essential for the performance of government functions. They are integral parts of the War Department, share in fulfilling the duties entrusted to it, and partake of whatever immunities it may have under the constitution and federal statutes." The court further stated, "[t]hat the establishment and control of post exchanges have been in accordance with regulations rather than specific statutory directions does not alter their status, for authorized War Department regulations have the force of law." 316 U.S. at 484.

(footnote continued on next page)

On June 17, 1974, the Senate Committee on Labor and Public Welfare issued Senate Report 93-937, which is the principal Congressional report on the 1974 amendments. The Senate Report interprets the exemption to apply to all exchange operated machines:

> Subsection (d) exempts certain activities from vending machine income assignment. Both military exchange systems and the Veterans Canteen Service operate under specific statutory authority, and are thus, as a matter of policy, excluded.

S. Rep. No. 937, *supra*, at 24.

A House version of the bill had been passed as part of H.R. 14225 on May 21, 1974; the Senate version on September 10, 1974. In presenting the conference version to the House for final passage, Mr. Brademas, floor manager of the bill and Chairman of the House Select Education Subcommittee, gave the following explanation of the military exchange exemption:

> Other provisions of the conference report, Mr. Speaker, address the question of the assignment of vending machine income.
>
> Briefly, this is what the bill would do.
>
> First. One hundred percent of income from machines in direct competition with a vendor, and 50 percent of income from machines not in direct competition shall accrue to blind vendors and their state licensing agencies:
>
> Second. At facilities where at least 50 percent of the hours worked are outside normal working hours, 30 percent of income from vending machines shall accrue to the vendors; and

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(footnote continued from previous page)

This misstatement in the statute is symptomatic of its inherent flaws which must be overlooked to carry out congressional intent.

> Third, Facilities with less than $3,000 annual vending machine income are totally exempt, as are retail military sales outlets and the Veterans Canteen Service.
>
> Mr. Speaker, the conferees are confident that these provisions will help blind vendors and adequately protect the rights of the Government and its employees with respect to the availability at all times of vending facilities and the assignment of income.
>
> Finally, Mr. Speaker, I would like to congratulate my friend in the other body, Senator Randolph, for his persistence in this matter.

Mr. Sikes, Chairman of the House Armed Services Committee, sought explicit confirmation of the extent of that exemption and the following exchange occurred between them:[17]

> Mr. SIKES. *I would like the distinguished subcommittee chairman to verify for the record, that this provision exempts from the revenue-sharing plan all those vending machines which are operated by the military post exchanges, Navy exchanges, officer and enlisted messes, and so forth.*
>
> As you are aware, the profits from those vending machines are utilized by the services to finance such

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17. The dissenter's comments on lack of a quorum are entertaining but legally in error. A quorum was established by a count of the members prior to debate on the conference report. Under House procedures a quorum is deemed present at all times until it is determined by a count of the House on a proper point of order that no quorum is present. Further, a member may make the point of order that no quorum is present whether there is, in fact, a quorum present or not. *See* VI C. Cannon, Cannon's Precedents of the House of Representatives, 805, 853 (1935). However, the question of a quorum cannot be raised once established by vote until "the Speaker has put the pending motion or proposition to a vote." H. Rep. Rule XV 6(e)(1); *see also* W. Oleszek, Congressional Procedures and the Policy Process, 125-26 (2d ed. 1984). Thus, during the debate, a quorum was legally present under House rules and the number of members present may, in fact, have constituted a quorum.

> worthwhile endeavors as the base libraries, the youth activities, the gymnasium, and other sports activities, hobby shops and motion picture programs, ashore and afloat. The servicemen finance these programs themselves through the revenues collected in the retail sales outlet systems as I have mentioned. *To require that these revenues be shared might well necessitate the appropriation of additional funds for the defense budget. Since work in the fiscal year 1975 defense appropriations bill has been completed, the effect would be to cut off these needed programs without support.*
>
> *Would the gentleman confirm for me the fact that it is the intent that this paragraph shall not apply to the military services, and that this is in keeping with the language on page 24 of the Senate report [S. Rept. No. 93-937] which is more specific on this issue that [sic] is the conference report?*
>
> MR. BRADEMAS. Mr. Speaker, I thank the gentleman from Florida for his fine remarks about this legislation. *I am pleased to tell the gentleman that the answer to both his questions is "Yes."* [Emphasis added.]

120 Cong. Rec. 35,712 (Oct. 16, 1974).

Immediately following that exchange, the House passed the bill. It could not be clearer that Congress did not intend to cut back on funds for the military or to make additional appropriations as a result of 1974 Randolph-Sheppard amendments. The exemption for the exchanges was intended by both the Senate and the House to be complete. The Claims Court opined that the colloquy's:

> significance is further diminished by the fact that it occurred on the House floor several weeks *after* the Senate passed the legislation and several days *after* the Senate unanimously agreed to the Conference Report. Clearly, one cannot say that the Senators who voted for the language in issue did so with any understanding of the meaning reflected in this subsequent colloquy.

6 Cl. Ct. at 741 (citations omitted). The Claims Court's analysis discounts the Senate's own legislative history. The House was adopting the Senate's understanding not vice versa. In any event, because of a presidential veto, Congress passed the bill again.[18] Mr. Brademas's explanation, confirmed by the colloquy, thus, is a major factor in determining the intent of both houses, as Mr. Brademas was not simply "another member" but the floor manager and chairman of the sponsoring committee whose remarks are entitled to particular weight. *See Lindahl v. Office of Personnel Management*, 105 S. Ct. 1620 (1985).[19]

All legislative history expressly addressing the possible diversion of income from the exchanges indicates that income was to be exempt. The records contain not even a suggestion of cutting funds for essential military services or making up the loss with additional appropriations. The exchanges simply were not to be affected, as the blind organizations themselves represented. The portions of the congressional report, relied on by the Claims Court (and accepted by the dissent) as support for its view, do not, in fact, indicate a contrary purpose. Rather, the portions were deemed supportive to its theory that "within retail sales outlets" must be given a *spatial* connotation, as a matter of linguistics. Further, Congressional approval of the "model" Marine Corps base was made with reference to providing *additional sites* for blind vendors, not with reference to income-sharing. The Marine Corps base was not then sharing income generated by exchanges and never has.

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18. Following initial passage, President Ford vetoed the bill, the veto was overridden. However, the President returned the bill to Congress claiming that the veto was a pocket veto (which could not be overriden) and not a return veto. Congress' override was based on the assumption that the veto was a return veto. To eliminate uncertainty, both the House and Senate again passed a bill with the identical military exchange exemption, S.4194, on November 26, 1974. *See S. Rep. No. 1297, 93d Cong., 2d Sess 1-2, reprinted in* 1974 U.S. Code Cong. & Ad. News 63473-74; *See also Kennedy v. Jones*, 412 F. supp. 353 (D.D.C. 1976). Thus, contrary to the Claims Court, the Senate passed the exemption after the colloquy in the House.

19. The dissent errs in discounting Mr. Brademas' statements and the Brademas-Sikes colloquy. As in *Lindahl*, these were not unreliable comments "just by 'a few congressmen,' but by the sponsor of the legislation [and chairman of the] Subcommittee from which it originated." 105 S. Ct. at 1631.

HEW's Interpretation of the Exemption

HEW had responsibility for coordinating the administration of the Act among the government agencies and was to draft regulations in consultation with them. There was substantial dispute between HEW and DOD as to the extent of the exemption provided for the military. None of the dispute, however, initially concerned the exemption of military exchanges. HEW agreed these organizations were exempt. Principally, the dispute was over an exemption for enlisted and officers' *messes* (not part of the exchanges). DOD pressed for such an exemption on the basis of the legislative history despite the absence of any language in the statute directed to the *messes.*

HEW vacillated on allowing this exemption. The negotiations between HEW and DOD and the series of proposed HEW draft regulations, as well as correspondence discussed below, confirm that the HEW position that military exchange income was to be diverted to the blind was a change from its original interpretation.

That the scope of the military exemption was not "plain" to HEW from the statutory language is evidenced by the various drafts of regulations which HEW considered over a period of two years. One of the first HEW drafts, dated March 20, 1975, read:

> [T]he provisions of this section shall not apply to income from *vending machines under the control of post exchange or ships' stores systems* authorized under Title 10, United States Code, or to Department of Defense morale, welfare, and recreation activities *or to Department of Defense clubs, messes, civilian restaurant and welfare funds*....[Emphasis added.]

This version continued through several drafts. An HEW memorandum dated June 2, 1975, clarified HEW's position with respect to DOD civilian employee funds:

> However, the latest revision of the proposed regulation proposed by the Department of Health, Education and Welfare (HEW) contains an exemption for

> these activities in recognition of legislative history (referring to discussions between Mr. Brademas and Mr. Sikes on October 18, 1974). While it is realized that this exemption could be interpreted to include both military and civilian morale, welfare, and recreation activities, HEW officials drafting the implementing regulation stated that such *exclusion is not intended to provide relief for civilian nonappropriated fund activities....*
>
> The latest revision of the proposed regulation is being circulated within HEW with its *expected publication* in the Federal Register *in about 60 days.* [Emphasis added.]

The proposed regulation was not, however, published and the next version in July, 1975, while continuing the exemption for the exchanges, eliminated the exemption for officer and enlisted messes and civilian groups. This version read:

> The provisions of this section shall not apply to income from vending machines under the control of post exchange or ships' stores systems authorized under Title 10 of the United States Code ....

DOD pressed for revision to exclude all vending machines in military base communities. The first suggestions by HEW that the exchange income was not exempt appears to have been made in October, 1975. DOD was continuing at that time to argue that messes and civilian DOD groups on military bases should be excluded. On December 23, 1975, HEW published proposed regulations simply repeating the statutory language with no interpretation of what the language meant. 40 Fed. Reg. 59,408, 59,414 (1975). DOD and HEW continued their negotiations.

On April 26, 1976, Congressman Sikes wrote Secretary Matthews of HEW, confirming that the intent of Congress was to exempt the military exchanges, stating: "Although the law was designed to expand opportunities for blind persons, it was not intended to cripple certain Armed Forces morale and welfare activities."

At an April 28, 1976, meeting with DOD, HEW personnel proposed defining "vending machine" in the regulations to exclude any "machines from which the revenue accrues to the Federal Government for credit to the Federal Government." HEW verified that the intent of this change was to exempt DOD non-appropriated fund instrumentalities.[20]

DOD then wrote HEW as follows:

> The revised wording of Section 1369.1(y) of the proposed regulations furnished to the attendees of the April 28 meeting and your *Mr. Shay's explanation that the revised wording is intended to accomplish the purpose of exempting vending machine income of Department of Defense (DOD) nonappropriated fund instrumentalities (NAFIs)* from the income-sharing provisions of the Amendments have, of course, *greatly eased our concern.* Assuming that the provisions of said Section 1369.1(y) are issued as revised, it would appear that the *Congressional intent* reflected in the 16 October 1974 exchange between Congressman Brademas and Congressman Sikes on the House floor will have been appropriately incorporated in the HEW regulations. [Emphasis added.]

On May 11, 1976, Secretary Matthews answered Congressman Sikes' letter, reassuring him that HEW appreciated his clarification of congressional intent with respect to officers and enlisted messes and that HEW was working closely with DOD. No mention was made of HEW's intention to deny exemption to income from exchange vending machine.

In June, 1976, Congressman Brademas wrote Congressman Sikes:

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20. Unlike other agencies, DOD used this term only for organizations performing approved government services—not civilian employee groups. Under this regulation, it is understood the messes would have been exempt. The question of an implied exemption for messes is not before us.

> [T]he problem with the Randolph-Sheppard act proposed regulations which you recently brought to my attention ...*appears to be solved.*
>
> The *Department of Health,* Education and Welfare *has advised my subcommittee that the interpretation* which we agreed upon in our colloquy on the House floor *would be adhered to.*
>
> Needless to say, I am glad that DHEW had decided to follow the intent of Congress in formulating its regulations. [Emphasis added.]

However, no regulations "conforming" to the intent of Congress were issued and HEW ceased consultation with DOD.

On March 23, 1977, HEW published final regulations which were exhaustive in other details but, with respect to the military exemption, did little more than repeat the statutory language. 42 Fed. Reg. 15,802-17 (1977), now 34 C.F.R. § 395.32 (1985).[21] Interestingly, the preamble to the regulations, in explaining why officers and enlisted messes were not considered exempt, states that the act "limits exemptions from the income sharing requirements *to systems authorized* under Title 10 of the United States Code ...." (Emphasis added.) 42 Fed. Reg. at 15,807. To exclude *messes* would, HEW stated, require statutory clarification despite their "linkage to Title 10." *Id.* On the other hand, HEW did exempt (without an explicit statutory basis) stamp vending machine, copy machines, pay telephones, coin-operated game machines, juke boxes and certain NASA and National Park Service concessions, 34 C.F.R. § 395.30 (1985), citing such reasons as "vending that is uniquely supportive of the Postal Service mission," too "significant" a change, probable "Congressional intent," and "not traditionally found in blind operated vending facilities." 42 Fed. Reg. at 15,806.

On July 7, 1977, DOD published its own proposed regulations which stated flatly that income sharing did "not apply

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21. The regulations added the words "operated" before "within" and "post" before exchanges.

to: "Income from vending machines operated by or for the military exchanges or ships' stores systems." 42 Fed. Reg. 34,895 (1977). The identical provision was included in DOD's final regulations. 42 Fed. Reg. 25,337, 25,341 (June 12, 1978), now 32 C.F.R. § 260.3(i)(3)(i) (1985).

The agencies were then at logger-heads. DOD attempted to get clarifying amendments before Congress. As acknowledged in the majority decision of the arbitrators:

> It should be noted, further, that DOD's inability to convince Congress to pass an amendment making clear the broad nature of the exemption is not helpful in assessing Congressional intention since HEW and its successor, the Department of Education, has, through the Office of Management and Budget, effectively blocked this legislation from being considered by Congress.

In 1979, HEW proposed to DOD that the Department of Justice resolve the conflict between the agencies, stating:

> Since the Department of Health, Education, and Welfare believes that only income generated *within* retail sales outlets is exempt, we believe that at this time, as suggested at the meeting held by the Office of Management and Budget, this issue of statutory construction is appropriate for referral to the Department of Justice for resolution.

However, it was not until the Oklahoma litigation that the matter was referred to the Department of Justice for resolution of the conflicting HEW/DOD interpretations. Justice upheld DOD. HEW acknowledges that it is bound by Justice's ruling and no longer advances its former unpublished interpretation.[22]

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22. The Claims Court erroneously believed that HEW's interpretation was entitled to more weight than DOD's. While HEW was the coordinator of the program throughout the government, it was only on a par with DOD in an interagency level dispute before Justice. *See* Exec. Order No. 12,146, 3 C.F.R. § 409.411 (1980).

Under these circumstances, there is no basis for deference to the interpretation by HEW. Internally, HEW has vacillated. Its published regulations have *never* set forth an interpretation of the statutory language. Its late-adopted private interpretation was never published or given effect. It is bound by Justice's interpretation. And, finally, in the face of Justice's interpretation, which conflicted with HEW's, HEW has found it unnecessary to *revise* its regulations. This is understandable since HEW's regulations have never done more than repeat the statute.

The Statutory Purpose

The Claims Court looked to the overall purpose of the legislation and concluded that an exemption for the exchanges would leave "little or no opportunity" for blind vendors on DOD installations since the majority of vending machines were operated by the exchanges. That finding is clearly erroneous in view of DOD's large contributions to state agencies for the blind.

In any event, the statutory purpose to be considered here is not simply the purpose of the legislation, but the purpose of the *exemption.* That exemption was designed to keep the financial support of essential services by the exchanges intact so that Congress need not appropriate additional funds. *Congress expected* the exchange income to continue to supplement *essential* programs approved by Congress. Senator Randolph, the blind groups, Mr. Brademas, Mr. Sikes, and both chambers of Congress all agreed on this purpose.

IV.

The Statutory Language

Given the congressional purpose of the exemption, the question becomes whether the language can reasonably be interpreted, as in DOD's regulation, to effectuate that purpose. We conclude that the statutory language has sufficient ambiguity to make DOD's interpretation reasonable.[23]

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23. Judge Davis, in his concurrence, more eloquently expresses the interrelationship of the strength of the language, on the one hand, and the strength of legislative history, on the other.

The first phrase which must be looked at is "income from vending machines." "Vending machine income" requires interpretation, as reflected by the definitions of these terms in HEW regulations setting out exclusions for vending machines of various types and at certain of the National Park Service and NASA facilities. 34 C.F.R. § 395.30 (1985). No statutory provision authorizes these exemptions. HEW simply deemed it necessary and witin its power to exclude certain categories of vending machine income which came within the literal words of the statute but were not, in HEW's view, within its intended scope.

"Within retail sales outlets" is not without some ambiguity. "Within" can mean "a part of" a system as well as "inside" a structure. "Retail sales outlets" need not mean "Stores." The military exchanges operate movie theatres and other recreation facilities, which easily fall within the term "retail sales outlets" and are not "stores." Indeed, an area with only vending machines has become a typical "retail sales outlet."

TSCB argues that the phrase "within retail sales outlets" is surplusage if DOD's interpretation is accepted.[24] By the same token, the words "under the control" are surplusage under the contrary interpretation. No real significance can be attached to either argument.

TSCB also argues that Congress narrowly drafted the exchange exemptions in comparison with the Veterans Canteen Service exemption. However, the Canteen Service does not have retail outlets which generate a surplus to be used for other services. It simply provides articles and services in veterans hospitals and any surplus income is required by statute to be turned in to the Treasury. 38 U.S.. § 4201. Thus, this difference in exemption language can be explained. In any event, both the Senate and the House said that *both* were intended to be wholly exempt.

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24. Although not very compelling, DOD's explanation, that the exchanges occasionally make sales which are "wholesale" in nature, at least gives some reason for including the phrase.

The parsing of sentences is a meaningless exercise here. Undoubtedly, in some instances where statutory language has been finely tuned to cover or to exclude, it is important to consider each word and its relationship to others with great care. This statutory provision was not drawn with great care or precision. For example, the reference to the exchanges systems being authorized by Title 10 is erroneous. *See supra* note 16.

We do not have an instance here where the words of an exemption were selected after debate over its scope. Indeed, in light of the legislative history, had no exemption been specifically granted, an interpretation by regulation to exclude the military exchanges from the definition of "vending machine income"—which HEW has concluded is proper for other agencies—would appear appropriate. The language selected to insure that the military exchanges were unquestionably exempt "represents an instance of inartful drafting rather than the intentional drawing of a subtle distinction." *Exxon Corp. v. Hunt,* 106 S.Ct. 1103, 1113 (1986).

V.

"An agency's construction of a statute it is charged with enforcing is entitled to deference if it is reasonable and not in conflict with the expressed intent of Congress." *United States v. Riverside Bayview Homes, Inc.,* 106 S. Ct. at 461. After considering the ambiguities in the statutory language, the legislative history supporting DOD's position, the purpose of the exemption, and the status of the military exchanges as non-appropriated fund instrumentalities performing essential government services, we are convinced that DOD's regulation is reasonable and is not in conflict with the intent of Congress as expressed in the statute. For the foregoing reasons, we agree with the 10th Circuit that DOD's regulation is not void. The judgement of the Claims Court is reversed.[25]

REVERSED

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25. The dissent, despite its length, has only one argument: the statutory language is unambiguous. If the slightest ambiguity were to be acknowledged by the dissent, its position crumbles away. In stark contrast, HEW, DOD, Justice, the three arbitrators, the Oklahoma district court and the judges

(footnote continued on next page)

(footnote continued from previous page)

of the Tenth Circuit all found the language subject to various interpretations. If the dissent did not distort the Tenth Circuit opinion on this point, the dissent would have no basis for characterizing our sister circuit's reasoning as "weak."

UNITED STATES COURT OF APPEAL
FOR THE FEDERAL CIRCUIT

TEXAS STATE COMMISSION FOR THE BLIND AND STATE OF TEXAS, *Appellees,*	)	
v.	)	Appeal No. 85-1954
THE UNITED STATES, *Appellant.*	)	

DAVIS, *Circuit Judge,* with whom MARKEY, *Chief Judge,* and FRIEDMAN, *Circuit Judge,* join, concurring in the result.

This case presents, in acute form, the recurrent problem of the tension between statutory language and legislative history. I write separately because, for me, the plurality opinion overstresses the alleged "ambiguity" of the statute, while the dissenters underplay the role of the legislative history. My general position is that pertinent legislative history is never wholly irrelevant in the construction of a statute but that the interrelationship of that history with the statutory text follows a continuous spectrum measuring the strength of the language, on the one hand, and the strength of the history, on the other. The more compelling and defintive the words are, the less controlling the legislative history; conversely, the less compelling and definite the language, the more controlling the history to the extent of its strength.[1] In this particular instance, my judgment is that Congress' words can permissibly accommodate a certain degree of breadth which is required by the very strong legislative history.

I start with the statutory words. If there were no pertinent legislative history (or if it were amorphous or weak) I would

1. I believe my general position does not contravene any established or definitive Supreme Court rule. There are many different variations in Supreme Court opinions on the use of legislative history, but in my understanding no definitive rule has emerged either that there are certain instances in which legislative history should not be considered at all, or that particular instance, my such history should always be taken into account.

certainly adopt the appellees' reading. To me, the normal meaning of section 107d-3(d) (exempting "income from vending machines *within the retail sales outlets* under the control of exchange or ships' stores system authorized by title 10") (emphasis added) covers only vending machines within post exchange stores (or perhaps immediately outside and adjacent to those facilities). However, that wording is not as precise or as definite as if the statute reached only vending machines "*inside*" exchange stores or ships' stores; rather, the words Congress actually used—"*within* the retail sales *outlets* under the control of [military] exchange ... *systems*" (emphasis added)—can have a wider reach and potentially be read, without necessarily turning white into black, as including all vending machines operated by the military exchange systems. As I have said, I would not take that course unless the legislative history compelled (or very strongly supported) that broader interpretation.

I agree with the plurality's view of the statute because, as I see it, the germane legislative history is very strong and points directly to the wider construction. The colloquy, on the floor of the House of Representatives, between Congressmen Brademas and Congressman Sikes[2] inescapably states that all vending machines operated by the military exchanges are exempt from the income sharing provision. This colloquy was not simply a floor exchange between two individual, ordinary members of the House. Congressman Brademas was Chairman of the House Select Education Subcommittee and floor manager of the very bill containing the disputed language; Congressman Sikes was Chairman of the House Armed Services Committee, obviously interested in the military exchange systems. Each spoke in that official capacity, and I think their joint views represented the position of their two committees. As the plurality opinion points out, the bill was passed by both Houses of Congress after the Sikes-Brademas colloquy. To me there is very little doubt that the colloquy had a primary role in the enacting of this amendment to the Randolph-Sheppard Act—equivalent in essence to a formal statement in a committee report. In fact Congressman Brademas referred (in June 1976 at the time the Department of Health, Education and Welfare

2. This colloquy is set forth in both the plurality opinion and the main dissent.

was drafting its regulations) to the Sikes-Brademas exchange as representing "the intent of Congress" (*see* plurality opinion, p. 27). There is nothing in the remainder of the legislative history which contradicts or conflicts with the Sikes-Brademas colloquy; on the contrary, the relevant part of the Senate Report (S. Rep. No. 937, 93rd Cong., 2d Sess. 24 (1974)) seems in its generality to exempt all vending machines operated by military exchange systems. The sum of it, for me, is that the significant legislators concerned with the precise question before us deliberately and knowingly chose the military version of the meaning of the disputed phase.

I add, however, that I disassociate myself from the emphasis in the plurality opinion on the position of the Department of Justice as relevant to this interpretive issue. As the main dissent points out, the statute expressly gives to the Department of Health, Education and Welfare (now Health and Human Services (HHS)) the power to promulgate regulations necessary to assure compliance with the provision before us (20 U.S.C. § 107d-3(g))—not to the Department of Justice or to the Department of Defense. The fact is, though, that the current HHS regulations are of no help because they do not deal at all with the dispute we are asked to resolve; an internal or unpublished HHS position (not promulgated in a regulation) does not have the status of a proper regulation, and need not be considered. In a word, there is now no regulation of which account should be taken in construing the statute.

UNITED STATES COURT OF APPEAL
FOR THE FEDERAL CIRCUIT

TEXAS STATE COMMISSION FOR THE BLIND AND STATE OF TEXAS, *Appellees,*	)	
v.	)	**Appeal No. 85-1954**
THE UNITED STATES, *Appellant.*	)	

SMITH, *Circuit Judge,* with whom NEWMAN, *Circuit Judge,* joins, dissenting.

I respectfully dissent.

The purpose of the Randolph-Sheppard Act is to create employment opportunities for the blind by requiring a priority for blind vending stands on all federal property. The priority is achieved and protected by requiring that income from vending machines operated by competitors must be shared with the blind vendors.

At issue in this appeal is the meaning of the exemption from income sharing for "vending machines within retail sales outlets under the control of exchange or ships' stores systems."[1] Also at issue are two conflicting approaches to statutory construction.

A substantial portion of the majority analysis is based on the silence of Congress with respect to military exchange appropriations. The majority also relies on a colloquy which took place on the House floor *when a quorum was not present.* On this tenuous basis, the majority established "congressional purpose" in the face of the admittedly clear language of the statute.

Plain Meaning of Statute

I can see nothing ambiguous or superfluous in the statutory

1. 20 U.S.C. § 107d-3(d) (1982).

exemption for "income from vending machines within retail sales outlets under the control of exchange or ships' stores systems." HEW, GAO, the arbitration panel, and the Claims Court reached the only possible conclusion when they decided that vending machines which are *not* within such retail sales outlets are *not* exempt from income sharing.

The majority, at the urging of DOD, has rewritten the statute by deleting the words "within retail sales outlets" from Congress" own language. The statutory exemption, as rewritten by the majority, now reads: "income from vending machines under the control of exchange or ships' stores systems." Only after rewriting the statute is it possible to conclude that the exemption covers *all* vending machines operated by the military exchanges, without regard to the machines' location.

The word "ambiguity' has been defined as "uncertainty of meaning" or "admitting of two or more meanings."[2] As for "uncertainty of meaning," it is not difficult to understand "within retail sales outlets" as having the certain meaning "inside the four walls of an exchange system store" (commonly known as "the PX").[3] As for "admitting of two or more meanings," the majority never reveals what *other* meaning "within retail sales outlets" has.[4]

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2. WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 66 (1967).

3. Contrary to the majority's implication, a court's act of explaining a statute is not evidence of ambiguity. The very function of the courts is to apply statutes and necessarily to interpret and explain them.

Here, DOD has asserted ambiguity where there is none. We explain the statute at DOD's insistence, and DOD cannot be heard to complain that the very act of explanation which it demands is evidence of ambiguity. If it were so, every statute which a party requires the court to apply would be deemed ambiguous. *See* 2A N. SINGER, SUTHERLAND STATUTORY CONSTRUCTION § 45.02 (4th ed. 1984).

4. The majority concedes that the "common" understanding of "within retail sales outlets" might be physically within the walls of a store, as the Claims Court held. The majority then embarks on an exploration of subjective policy considerations, leaving us in suspense as to what other possible meaning the words could have. When the majority finally returns to the statutory language, it is with the ambivalent statement that " '[w]ithin retail sales outlets' is not without some ambiguity."

Contrary to the majority's assertion, the Tenth Circuit did not hold or even imply that the statute was at all ambiguous. The Tenth Circuit stated in *Oklahoma v. Weinberger*:[5]

> We agree with DHS [Department of Health and Services of the State of Oklahoma] that a literal reading of the exception limits the exception from revenue sharing only to "vending machines *within* retail sales outlets under the control of exchange or ships' store system." *** [Emphasis in original.]

Similarly, the district court in *Oklahoma* found that "[r]ejection of the 'plain meaning' of the exemption" was necessary because:[6]

> Following the literal meaning of the words would, in this case, compel concurrence with the plaintiff's position as "vending machines within retail sales outlets" would appear to refer to machines within an exchange store. ****

Rather, the rationale of the Tenth Circuit and the Western District of Oklahoma was that:[7]

> a court has "some ['Jscope for adopting a restricted rather than a literal or usual meaning of its words where acceptance of that meaning would lead to absurd results ... or would thwart the obvious purpose of the statute[.'] ..." ***

I agree with the Tenth Circuit that the statute is unambiguous. But notwithstanding my great respect for the Tenth Circuit, I cannot agree that the literal meaning of the words

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5. *Oklahoma v. Weinberger*, 741 F.2d 290, 292 (10th Cir. 1983), *cert. denied*, 104 S. Ct. 2345 (1984).

6. *Oklahoma v. Weinberger*, 582 F. Supp. 293, 294-95 (W.D. Okla. 1982), *aff'd*, 741 F.2d 290 (10th Cir. 1983), *cert. denied*, 104 S. Ct. 2345 (1984).

7. *Oklahoma*, 582 F. Supp. at 295 (quoting *Trans. Alaska Pipeline Rate Cases*, 436 U.S. 631, 643 (1978)); *see also Oklahoma*, 741 F.2d at 292.

would lead to "absurd results" or "thwart the obvious purpose of the statute."[8]

A. Clear, Customary Meaning.

Section 107d-3(d) states:[9]

> (d) Income from vending machines in certain locations excepted
>
> Subsections (a) and (b)(1) of this section shall not apply [1] to income from vending machines within retail sales outlets under the control of exchange or ships' stores systems authorized by title 10, or [2] to income from vending machines operated by the [V]eterans Canteen Service***.

This section creates distinct exemptions: one for the exchange systems and another for the veterans canteen service.

The exemption provided for the exchange systems, unlike the one provided for the canteen system, contains *two* phrases of modification. Not only must the machines be "under the control of" the exchange system, the machines must also be "within [its] retail sales outlets." As the Claims Court correctly determined, the plain and customary meaning of the word "within" clearly connotes spatial boundaries.[10] The common usage of the word "within" is "to indicate enclosure or containment."[11]

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8. The weakness in the Tenth Circuit's reasoning is that the common meaning of the words does *not* lead to "absurd results" or "thwart the obvious purpose of the statute." Indeed, the common meaning of the words *must* be used "where no such consequences would follow and where ... [the plain meaning] appears to be consonant with the purposes of the Act ....' " *Trans Alaska*, 436 U.S. at 643 (quoting *Commissioner v. Brown*, 380 U.S. 563, 571 (1965)).

9. 20 U.S.C. § 107d-3(d) (1982).

10. *Texas State Comm'n for the Blind v. United States*, 6 Cl. Ct. 730, 738 (1984).

11. WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 2627 (1967). In Shakespeare's time "within" could also mean "in the control of," but this definition is obsolete. *Id.*

Thus, as the majority concedes, the customary meaning of "within retail sales outlets" is "physically within the walls of a store."

DOD argues that "within" implies more than just "contained in" and that the exemption protects all machines operated by the military exchanges.[12] DOD contends that "within" can mean something other than *spatial* proximity—for example when used to mean "within the law."[13]

In the context of section 107d-3(d), DOD's interpretation would require this court to hold that "within" really means "within and without." DOD's interpretation completely reads out of the statute the phrase "within retail sales outlets." Basic principles of statutory construction require that effect should be given to each word of the statute so that no part will be rendered meaningless.[14] The two distinct phrases of modification in the statute clearly suggest that vending machines must be more than "under the control of" the military exchanges. The machines must also be "within [a] retail sales outlet."

No definition for "within" urged by DOD makes sense when read in the context of section 107d-3(d). If Congress had simply meant "under the control of" the military exchanges, it would not have included the phrase "within retail sales outlets" in the statute at all. DOD considers the word "within" in isolation and discusses the almost metaphorical meanings that it can take on in other contexts. As this court has recently explained,

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12. It is significant to note that the case cited by DOD for this argument adopts the common meaning and defines the word "within" to mean "inside the bounds" and "not without." *Town of Alexandria v. Clark County*, 231 S.W. 2d 622, 624 (Mo. 1950).

13. Although "within" in that context connotes something other than *physical* space, it still means "inside the boundaries of "or "contained in." DOD can offer no accepted synonym or use of the word that when read in context with "retail sales outlets" can lead to the result it desires.

14. *Rickler v. United States*, 396 F.2d 454 (Ct. Cl. 1968); 2A SUTHERLAND § 46.06 (1984); *see also Hart v. United States*, 585 F.2d 1025, 1035 (Ct. Cl. 1978) ("People are entitled to find in the statute books the laws that govern them.").

statutory words "cannot be considered in a vacuum. We sit to interpret a statute, not a word."[15]

The majority also accepts DOD's argument that the phrase "retail sales outlet" can describe "a cluster of vending machines or even a single vending machine" and that the statute, thereby, exempts all machines. The first error in this strained interpretation is that it is contrary to the accepted meaning of the word "outlet." The term outlet has a common, everyday meaning of "a market for a commodity" or "a retail store."[16] It is well settled that unless Congress has clearly indicated a contrary meaning, a word's customary, everyday meaning is favored.[17]

A second problem with DOD's construction of the phrase "retail sales outlet" is that, in context, it makes the statute meaningless. By equating a vending machine with a "retail sales outlet," DOD construes the statute to exempt "income from vending machines within vending machines." Such a bootstrapped definition would read all meaning out of the exemption. The Claims Court reached the correct interpretation by accounting for all of the words in the statute, without nullifying any of its terms.

B. Veterans Canteen Service Exemption.

DOD's construction of the statute is as follows:

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15. *United States v. John C. Grimberg Co.*, 702 F.2d 1362, 1366 (Fed. Cir. 1983). The decision in *Grimberg* hinged on whether "claim" meant a claim filed with the Claims Court or a claim filed with the Government's contracting officer. *Grimberg* held that the word "claim" had to be read in context, just as the word "within" must be read in context here. Certainly, *Grimberg* provides no support for the majority to change the meaning of the statute by deleting words from it.

16. WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1602 (1967).

17. *Lynch v. Alworth-Stephens Co.*, 267 U.S. 364, 370 (1925) ("the plain, obvious and rational meaning of a statute is always to be preferred to any curious, narrow, hidden sense that nothing but the exigency of a hard case and the ingenuity and study of an acute and powerful intellect would discover" (quoting lower court opinion, 294 Fed. 194)); *Benson v. United States*, 488 F.2d 1017, 1020 (Ct. Cl. 1973); *Prudential Ins. Co. of America v. United States*, 319 F.2d 161, 166 (Ct. Cl. 1963).

> The literal words of the statute may fairly be read as exempting from income sharing *any vending machine* that is a part of ["within"] a network of sales facilities ["retail sales outlets"] *operated by or for a military exchange.* *** [Emphasis supplied.]

Thus, DOD is really arguing to be treated like the veterans canteen service. Section 107d-3(d) specifically exempts "vending machines *operated by* the Veterans Canteen Service" (emphasis supplied). The wording of the exemption for the canteen services proves two things. First, Congress knew how to draft the exact exemption that DOD wants, because it did so in the very next clause. Second, this exemption proves that Congress *only* wanted to provide this broad exemption (encompassing all machines, regardless of location) to the veterans canteen service.[18]

Legislative History

Where the words of a statute are clear, there is no need to review the legislative history.[19] A corollary is that the

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18. The reason for the distinction lies in the nature of the two departments. First, the veterans canteen service is specifically authorized under law and is a direct entity of the Federal Government. 38 U.S.C. § 4201 (1982). Second, the canteen system and the exchanges serve different customers and different ends. The legislative history shows that Congress was well aware of the veterans canteen services' unique legal and factual status. *Randolph-Sheppard Act for the Blind Amendments of 1973: Hearings on S. 2581 Before the Subcomm. on the Handicapped of the Senate Comm. on Labor and Public Welfare,* 93d Cong., 1 Sess. 26 (1973) (hereinafter cited as *1973 Hearings*).

19. The majority departs from the path established by the Supreme Court:

"It is elementary that the meaning of a statute must, in the first instance, be sought in the language in which the act is framed, and if that is plain, and if the law is within the constitutional authority of the law-making body which passed it, the sole function of the courts is to enforce it according to its terms. [Citations omitted.]

"Where the language is plain and admits of no more than one meaning the duty of interpretation does not arise and the rules which are to aid doubtful meanings need no discussion. [Citation omitted.] There is no ambiguity in the terms of this act.***

(footnote continued on next page)

legislative history cannot be used to create ambiguity where there is none in the statute.[20]

The majority has placed great reliance on excerpts from the legislative history; however, other portions of the same reports give a clear indication that Congress fully addressed a much broader problem than that spotlighted by the majority. In addressing that part of the majority opinion, the words of our predecessor court, the Court of Customs and Patent Appeals, give us guidance:[21]

> We have dwelt at some length upon this phase of the case not because we regard the statute as ambiguous, because we do not so regard it, but out of respect for the views of those who think otherwise. Even if we be in error as to this, however, we do not regard such legislative history as has been cited here controlling.

A. Purpose of the Act.

The majority unacceptably narrows the purpose of the act by focusing only on "civilian employee groups." Thus the majority ignores Congress' language reaching "all Federal property," including DOD and military bases in particular.

Notwithstanding the appeal of arguments made on behalf of the military, the Randolph-Sheppard Act is primarily legislation in support of the blind. The primary purpose of Congress

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(footnote continued from previous page)

"Statutory words are uniformly presumed, unless the contrary appears, to be used in their ordinary and usual sense, and with the meaning commonly attributed to them.***"

Caminetti v. United States, 242 U.S. 470, 485-86 (1917); *see Packard Motor Car Co. v. NLRB*, 330 U.S. 485, 492 (1947); *Selman v. United States*, 498 F.2d 1354, 1356 (Ct. Cl. 1974).

20. *Railroad Comm'n of Wisconsin v. Chicago, B. & Q. R.R.*, 257 U.S. 563, 589 (1922) ("Such aids are only admissible to solve doubt and not to create it.") *United States v. Kung Chen Fur Corp.*, 188 F.2d 577, 584 (CCPA 1951).

21. *Kung Chen Fur*, 188 F.2d at 585.

was to create a 2-pronged approach to establish a *priority* for blind vendors. First, Congress ordered that one or more blind vending stands must be placed on *all federal property.*[22] Congress recognized, however, that since 1936 the act had already required a "preference" for blind vending *stands* on all federal property. The act had been unsuccessful because of competition from vending *machines:*[23]

> Blind vendors collectively have been confronted with obstacles at virtually every turn. Competition from automatic vending machines has increasingly threatened to suffocate the blind vendor program. ***

The act had been amended in 1954 to require the assignment of vending machine income to blind vendors, where vending machines were in direct competition with the blind:

> The provision was believed necessary due to the unanticipated growth of automatic vending machines on Federal property, which were beginning to affect blind vendor operations. Unfortunately, that language did not have the desired effect of protecting the livelihood of blind vendors. On the contrary, in the intervening twenty years since the enactment of the provision, the automatic vending machine has been vastly improved, the kinds of food and other merchandise sold through such machines have greatly expanded, and the numbers of machines on Federal property have grown exponentially. Not only has the existing language failed to protect the blind vendor, in many cases the language has been disregarded, and vending

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22. The majority concedes that military bases are subject to the required priority for blind vendors. Thus, one or more blind vending stands must be established on every military base. *See* 20 U.S.C. §§ 107(b)(2), 107e(3) (1982). Congress expected to double the number of blind vendors in 5 years by removing obstacles to growth and requiring blind vending stands on "*all* Federal property." (Emphasis supplied.) Randolph-Sheppard Act Amendments of 1974, Pub. L. No. 93-516, § 201, 1974 U.S. CODE CONG. & AD. NEWS 1868, 1869.

23. S. REP. NO. 937, 93d Cong., 2d Sess. 10, 14-15, *reprinted in* 1974 U.S. CODE CONG. & AD. NEWS 381, 385-86.

> machines now constitute a major threat both to the livelihood of individual blind licensees and to the growth of the program as a whole.

The existing law in 1974 *already* required a preference for blind vendors on military bases. Yet there were only 46 blind vending stands on 490 military bases.[24] Congress was forced to take decisive action to achieve its stated goal of one or more blind vendors on *every* military base.

Thus, Congress created the second prong, called "income sharing" to "achieve and protect" the priority for blind vendors.[25] Income sharing was enacted to prevent competitors from driving blind vendors out of business. A competitor who placed vending machines at the same location as the blind vendor was required to assign *100 percent* of the vending machine net income to the blind vendor.[26]

Similarly, the competitor could not continue to block the placement of a blind vending stand. Even if the competitor succeeded at keeping the blind vendor off the federal property altogether, the competitor was still required to share 50 percent of the vending machine net income with state blind associations.[27]

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24. *1973 Hearings* at 31.

25. 20 U.S.C. §§ 107(b)(1), $07d-3 (1982).

26. 20 U.S.C. § 107d-3(b)(1) (1982). The existing law in 1974 *already* required assignment of vending machine income where the machines were in direct competition with blind vendors. In 1974, there was *no* exemptions from income assignment; yet DOD had refused to assign income to the blind vendors, as required by law. *Review of Vending Operations on Federally Controlled Property,* Report to the Subcomm. on the Handicapped, Senate Comm. on Labor and Public Welfare, Comp. Gen. Rep. B-176886 at 27 (Sept, 27, 1973) (GAO Report); *see Texas State,* 6 Cl. Ct. at 733 n.6.

Thus, in the 1974 amendments, Congress found it necessary to direct the Secretary of HEW to "take such action and promulgate such regulations as he deems necessary to assure compliance" with income sharing. 20 U.S.C. § 107d-3(g) (1982)

27. 20 U.S.C. § 107d-3(b)(1) (1982).

Congress designed income sharing to "remedy the evil" of vending machine competition facing blind vendors.[28] The two prongs of Congress' approach go hand-in-hand. The admitted *priority* for blind vendors on military bases simply cannot be "achieve[d] and protect[ed]"[29] without the income-sharing provisions of the act.

There can be no doubt that Congress specifically targeted the "evil" of DOD abuses of the Randolph-Sheppard Act when it enacted the 1974 amendments:[30]

> Commanders of military installations are singularly insensitive to the need to develop the program. The vast Defense establishment can report only 9 blind vendors at Air Force facilities, 17 on Army posts, and 16 at Navy bases. The parent Defense Department association at a major Federal space installation demanded that blind vendors give a portion of their income to the association—*precisely the reverse of what should be taking place on Federal property.* *** It can be concluded from this and other evidence that there are widespread, major abuses of blind vendors and of the Randolph-Sheppard program. It is the firm resolve of the Committee that such abuses must cease. [Emphasis supplied.]
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> * * * * *

Very few blind vendors are to be found at military

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28. The majority misplaces its reliance on *Church of the Holy Trinity v. United States,* 143 U.S. 457 (1892), where the Supreme Court adopted a *restricted* meaning of the word "labor" to include only "cheap, unskilled labor" and not to include *preachers.* The statute was intended to "remedy the evil of unskilled immigrants who worked for low wages.

Here, the "evil" expressly includes the military exchanges' use of vending machines to compete with blind vendors. Futhermore, the majority does not adopt a "restricted" meaning of the words "within retail sales outlets." By deleting the words, the majority *expands* the scope of the exemption. *Holy Trinity* is devoid of any support for this novel judicial legislation.

29. 20 U.S.C. § 107(b)(1) (1982).

30. S. REP. NO. 937 at 10-11, 17.

> installations. Witnesses before the Committee have stated that each military post or base commander is in charge of his particular installation, and that, for the most part, commanders are either hostile or indifferent to the Randolph-Sheppard program. This attitude has severely curtailed the growth of the program within the Defense Department. Lt. General Leo Benade, the department's witness in the hearings on S. 2581, recognized the deficiencies. He said:
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> > "I do not think the military departments ... are insensitive, but I am not very proud of our record, and I think we can do better, and we will."

The majority concedes that one or more blind vending stands must be placed on every military base, but the majority takes the *teeth* out of the statute by recognizing only the first prong (priority for blind vendors on every base) and not the second prong (income sharing "to achieve and protect such priority.[31]

B. Sound and Meaningful Distinction.

DOD argues that the interpretation arrived at by the Claims Court leads to an "absurd result" because it

> creates a distinction—between machines physically located inside the four walls of retail stores and machines in other locations—that cannot be justified by reference to any logical policy***.

Although this contention is stated emphatically, DOD offers no argument or reasons to back it up.

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31. Under the majority's holding that military exchanges are wholly exempt from income sharing, the exchanges will continue to profit by competing directly with blind vendors and by blocking the placement of blind vending stands. The majority "thwarts the obvious purpose of the statute" to increase the number of blind vendors on military bases from 46 to 490 or more, by gutting the statute of its two strengths: (1) income sharing and (2) administration by HEW.

The distinction between machines within retail stores and those in other locations appears to be consistent with Congress' goals and of the compromise struck between the exhange system and the blind. Congress exempted from the income-sharing provisions the revenue from machines located *within* the exchanges, thereby allowing the exchanges to sell within the store, by machine, whatever they could sell ordinarily. Thus, a blind vendor could not claim that, because an exchange store was selling cigarettes or drinks from a machine rather than by a human, he was entitled to share the income. On the other hand, the exemption does not allow the exchanges to nullify the priority for blind vendors by placing competing vending machines over the entire base.

It is DOD's interpretation that leads to a result plainly at variance with the purpose of the statute, because the interpretation would grant DOD the power to completely circumvent the act. DOD regulations expressly deny the priority for blind vendors with respect to vending machines operated by the exchange system.[32] Thus, if DOD's interpretation prevails, it could keep all blind vendors off military bases by ruling that a blind vendor would be competing with a machine operated by the exchange system. This self-appointed power was pointed out to Congress by GAO and it formed a basis for the narrow compromise exemption.[33]

C. Congress' Silence on PX Appropriations.

One of the consequences of the Randolph-Sheppard Act is that military exchanges are subject to income sharing from vending machines outside the PX stores. The cost of compliance with the act would be less than 4 percent of the exchanges' total annual income.[34] The act is completely silent about

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32. Army Air Force Exchange System Randolph-Sheppard Act Compliance Manual, ESM 11-2, p. 2-1.

33. GAO Report at 26; *see Texas State*, 6 Cl. Ct. at 733.

34. *Oversight of the Randolph-Sheppard Act, 1979: Hearings Before the Subcomm. on the Handicapped of the Senate Comm. on Labor and Human Resources*, 96th Cong., 1st Sess. 93 (1979) (statement of Maj. Gen. Stanley M. Umstead, Jr.) (1979 Oversight Hearings).

additional appropriations for the military exchanges to make up for the income sharing. This is not surprising, since this particular act was intended to help the blind; its primary purpose was not to help soldiers and sailors.

The majority, however, attaches great significance to Congress' silence. Under the majority's view, it is not sufficient for Congress to require the military exchanges to share income with the blind. Congress also must demonstrate that it has considered whether additional appropriations will be necessary for the military exchanges.[35]

The Supreme Court has warned of the danger in the majority's approach: "[t]he search for significance in the silence of Congress is too often the pursuit of a mirage.[36] In still another case, the Supreme Court stated:[37]

> [I]t would be a strange canon of statutory construction that would require Congress to state in committee reports or elsewhere in its deliberations that which is obvious on the face of a statute. In ascertaining the meaning of a statute, a court cannot, in the manner of Sherlock Holmes, pursue the theory of the dog that did not bark. [Citation omitted.]

The Supreme Court "has never insisted that a legislative body articulate its reasons for enacting a statute.[38] Thus, it is not a function of the courts to "presume that 'Congress was

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35. The Claims Court's discussion of whether additional appropriated funds would be necessary to satisfy the judgment is relevant only to Claims Court jurisdiction, and not to the merits of the case. *Texas State*, 6 Cl. Ct. at 737. Although the majority characterizes this as "tortured" reasoning, the majority concedes that no additional appropriations are necessary to satisfy the judgment.

36. *Scripps-Howard Radio, Inc. v. FCC*, 316 U.S. 4, 11 (1942).

37. *Harrison v. PPG Indus., Inc.*, 446 U.S. 578, 592 (1980).

38. *United States R.R. Retirement Bd. v. Fritz*, 449 U.S. 166, 179 (1980).

unaware of what it accomplished....' "[39]

Congress was not obliged to discuss military PX appropriations in this statute related to the blind vending program. The majority errs in pursuing "the theory of the dog that did not bark."

The majority's reliance on PX appropriations in other legislation totally unconnected to the Randolph-Sheppard Act is too remote to be relevant in discerning legislative intent in the present act.[40]

D. Colloquy on the House Floor.

Historically, the courts have been extremely reluctant to

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39. *Albernaz v. United States*, 450 U.S. 333, 342 (1981) (quoting *United States R.R.*, 449 U.S. at 179).

The majority implies that DOD had "no opportunity for input" to the Senate Committee because it did not appear at one meeting on January 9, 1974. The majority ignores the lengthy statement of Lt. Gen. Leo E. Benade, Deputy Assistant Secretary for Military Personnel Policy, Department of Defense, on November 19, 1973, before the subcommittee. DOD repeatedly expressed its concern for the impact of the Randolph-Sheppard Act on the military exchange system, with particular emphasis on vending machines. DOD warned the subcommittee that '[t]he proposed changes to the Randolph-Sheppard Act would reduce [the military exchanges' income from vending machines] by as much as $20 million each year" (out of a total income of $66 million/year). *1973 Hearings* at 98-103.

DOD's estimate of the impact on military exchanges turned out to be an overstatement. At the 1979 Oversight Hearings, DOD admitted that it would be liable for only $4.4 million in income sharing under the statute out of $120 million received by the exchanges annually. *1979 Oversight Hearings* at 93.

The majority's cry that the statute tolls the death knell for the military exchanges is simply untrue, since the exchanges are subject to sharing less than 4 percent of their income. It cannot be said that Congress was unaware of the consequences of its act, since it was warned of consequences far more severe than would actually result from applying the statute. Congress was fully aware of the military exchanges' use of vending machines income, both from Lt. Gen. Benade's statement and from GAO's thorough investigation of DOD.

40. See 2A N. SINGER, *SUTHERLAND STATUTORY CONSTRUCTION* § 51.03 (4th ed. 1984).

consider statements made by legislators during floor debate. In the landmark case of *Aldridge v. Williams*,[41] the Supreme Court held:

> In expounding this law, the judgment of the court cannot, in any degree, be influenced by the construction placed upon it by individual members of Congress in the debate which took place on its passage, nor by the motives or reasons assigned by them for supporting or opposing amendments that were offered. The law as it passed is the will of the majority in both houses, and the only mode in which that will is spoken is in the act itself; and we must gather their intention from the language there used***.

Explanatory statements made by the committeeman in charge of the bill when presenting it for passage have been used as an "aid to the interpretation of a statute where its language is doubtful or obscure.[42] "But while they may be looked at to explain doubtful expressions, not even formal reports—much less the language of a member of a Committee—can be resorted to for the purpose of construing a statute contrary to its plain terms."[43]

The Supreme Court again explained the limits on the use of statements by the committeeman in charge of the bill:[44]

> [W]hen taking the act as a whole, the effect of the language used is clear to the court, extraneous aid like this can not control the interpretation. [Citations omitted.] Such aids are only admissible to solve doubt and not to create it. ***

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41. *Aldridge v. Williams*, 44 U.S. 9, 24 (1845).

42. *Wisconsin R.R. Comm'n*, 257 U.S. at 589.

43. *Pennsylvania R.R. v. International Coal Mining Co.*, 230 U.S. 184, 199 (1913).

44. *Wisconsin R.R. Comm'n*, 257 U.S. at 589.

It is impossible to discover the "intention of Congress" from remarks made by individual legislators on the congressional floor.[45] The safest guide to congressional intent is found in the words employed by Congress in the statute.[46]

Judge Skelly Wright has stated;[47]

> [Q]uotes from legislative floor debate do not persuade us to deviate from the statute's clear language.***
>
> ***[T]he significance of such comments from legislative floor debates is limited, not only because of such clear statutory language, but also because "[t]he remarks of a single legislator, even the sponsor, are not controlling in analyzing legislative history. ***" [Citation omitted.]

As our predecessor, the Court of Claims, has cautioned:[48]

> Congress may be presumed not unskilled in the use of words and highly likely to have enacted what it intended. It is foolish to abandon this presumption where the legislative history is perceivably full of pitfalls that cannot readily be avoided. Some pitfalls are invisible to the judicial eye, but the most myopic can see one in a committee report that contradicts the

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45. *Friedman v. United States.* 310 F.2d 381 (Ct. Cl. 1962), *cert. denied, Lipp v. United States,* 373 U.S. 932 (1963):

"*** The earlier colloquy at the hearings involving Congressmen Doyle and Clements—on which reliance has been placed ***—can be said to represent only their own views and not the position of the subcommittee, or the full committee, let alone of the House or the Senate as a whole." 310 F.2d at 405.

46. *Aldridge,* 44 U.S at 24.

47. *Northern Colo. Water Conservancy Dist. v. Federal Energy Regulatory Comm'n,* 730 F.2d 1509, 1518 (D.C. Cir. 1984) (quoting *Chrysler Corp. v. Brown,* 441 U.S. 281, 311 (1979)). *See also General Elec. Co. v. United States,* 610 F.2d 73, 734 (Ct. Cl. 1979).

48. *Hart,* 585 F.2d at 1035.

> plain language of a statute in guise of interpreting it, or makes manifestly incorrect statements about it or what it does. ***

The "judicial eye" must see that there are pitfalls in resorting to floor debate which "contradicts the plain language of a statute in guise of interpreting it." Indeed, a member of Congress has warned us that legislators may enter into a "friendly colloquy" in the hope that the courts will accept their language instead of the plain language of the statute:[49]

> Mindful of this judicial scrutiny, legislators of today have used the opportunity of debate to achieve legislative goals which might otherwise be unattainable. Indeed, by the use of the "friendly colloquy," two men may be able to legislate more effectively than all of Congress.
>
> This type of colloquy is presented in the form of a friendly exchange of questions and answers about the pending legislation between members, one of whom is usually a member of the committee from which the legislation emanated. This seeming repartee is not accidental. In fact it is just the opposite. It has been carefully planned by the parties for the express purpose of providing a legislative interpretation of a statutory provision which might otherwise be differently interpreted.

Turning now to the colloquy relied upon by the majority, it can be seen that under the "guise of interpret[ation]" Congressman Sikes "contradicts the plain language of the statute" and makes "manifestly incorrect statements about it or what it does."[50] Sikes quotes the statutory language limiting the exemption to "vending machines 'within the retail sales outlets,' "

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49. W. Moorhead, *A Congressman Looks at the Planned Colloquy and Its Effect in the Interpretation of Statutes, reprinted in* 3. C. SANDS, SUTHERLAND STATUTORY CONSTRUCTION 639 (4th ed. 1973).

50. *Hart*, 285 F.2d at 1035.

and then in the next sentence "presume[s] *** that this provision exempts from the revenue-sharing plan *all* those vending machines which are operated by the military post exchanges *** and so forth."[51] (Emphasis supplied.) He continued by stating that the income-sharing provisions "*shall not apply to the military services*" (emphasis supplied), a statement so clearly erroneous that even DOD acknowledges that the exemption is not so broad as Sikes claimed. Sikes also indicated his concern for the funding of the "worthwhile endeavors" of the military exchange program, stating his belief that additional appropriations for that year would be impossible.

The majority opinion would give legislative effect to the overbroad statements of one member of Congress by means of the terse answer "yes" given by another member. The classic response to this is that a shorter and more accurate answer by the second gentleman would have been "no."

Perhaps the greatest danger in rewriting the statute on the basis of this colloquy, not addressed in the majority opinion, is that *there was not a quorum present when the colloquy took place.*[52] Thus, the "two men [were] able to legislate more effectively than all of Congress."[53]

With apologies to Gilbert and Sullivan,[54] it may be observed that:

> "Things are seldom what they seem
> Skim milk masquerades as cream."

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51. 120 CONG. REC. 35,712 (1974).

52. *Id.* Also, the remarks were made *after* the Senate voted. *See Texas State*, 6 Cl. Ct. at 741. Although both houses voted again over 1 month later to override the veto, it is not realistic to assume that Congress even considered this bit of colloquy, grown stale in the record, over the words in the bill itself. "Congress may be presumed not unskilled in the use of words and highly likely to have enacted what it intended." *Hart*, 585 F.2d at 1035.

53. W. Moorhead, *reprinted in* 3 C. SANDS, SUTHERLAND STATUTORY CONSTRUCTION at 639.

54. W. Gilbert, *H.M.S. Pinafore*, Act II (1878), quotation *reprinted in* J. Barlett, *Familiar Quotations* 623 (11th ed. 1937).

> Two and two aren't always four
> In dialogue upon the floor
> Of any legislative forum,
> In the absence of a quorum
> This circumstance may be revised,
> Now all debates are televised.
> Attendance now, so we envision,
> Will improve with television.

I have no doubt that Congressman Sikes was sincere in his concern for the welfare of the military exchanges; indeed, I would expect such concern from the Chairman of the House Armed Services Committee. Nor do I question the authority of Congress to enact a statute such as Sikes would have preferred.

There is no doubt that if Sikes had been successful in amending the bill to delete the words "within retail sales outlets," and if Congress had passed such a bill, this court would give effect to the resulting statute. The only hitch is that the bill was *not* amended to delete the language to which Sikes objected.

DOD comes to this court asking us to give effect to the language of Congressman Sikes (before less than a quorum of 1 house) rather than the language of the statute enacted by Congress. This we cannot do under the precedent of the Supreme Court and our predecessor courts. "Even assuming, for the time being," that it would make more "economic sense" to exempt *all* vending machines instead of only those machines "within retail sales outlets":[55]

> [W]e would only be left with the fact that Congress could have promulgated a better and more meaningful statute. Nevertheless, to improve legislation is certainly not the function or responsibility of the court. "[O]ur problem is to construe what Congress has written. After all, Congress expresses its purpose by

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55. *Ricker v. United States*, 396 F.2d 454, 456 (Ct. Cl. 1968) (quoting *62 Cases, More or Less Each Containing Sixty Jars of Jam v. United States*, 340 U.S. 593, 596 (1951).

> words. It is for us to ascertain—neither to add nor to substract, neither to delete nor to distort'."***

"Since Congress thought there was a reason'"[56] to grant an exemption for vending machines "within retail sales outlets," but not for vending machines in other locations, "we cannot say otherwise."[57]

The Court of Claims further stated in *Ricker*:[58]

> Defendant would have us delete or ignore the clear language of the statute. We must adhere to the rule stated in Prudential Ins. Co. of America v. United States***: "It is fundamental that an unambiguous statute should be given effect according to its plain and obvious meaning". [Citation omitted.]

It is not within the power of this court to rewrite the Randolph-Sheppard Amendments of 1974 under the rationale of "no economic sense."

I would give effect to the words employed by Congress. The exemption from income sharing applies to "vending machines within retail sales outlets under the control of exchange or ships' stores systems." All other vending machines under the control of the exchange systems are subject to income sharing, as provided by the Randolph-Sheppard Act.[59]

E. Subsequent Letters from Congressmen.

The majority errs in relying on letters, written by individual congressmen subsequent to the bill's enactment, as evidence of "the intent of Congress."[60] As the Court of Claims has

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56. *Ricker*, 396 F.2d at 456.

57. *Id.*

58. *Id.*

59. 20 U.S.C. § 107d-3(b) (1982).

60. *See* 2A N. SINGER, SUTHERLAND STATUTORY CONSTRUCTION § 48.16.

stated:[61]

> How [a congressman] could possibly have "personal knowledge of the object or intention of the enactment" by both Houses of Congress is not easy to comprehend. At most he could have only personal knowledge of his own object and intention, and that would not go far towards showing the object and intention of each, or of a majority of the several hundred members of the House of Representatives and of the members of the Senate in passing the act,***.

Futhermore, if subsequent interpretations were relevant, the 1979 Oversight Hearings indicate that Congress enacted exactly the words it intended in the 1974 statutory exemption. Senator Randolph, the author of the act, was highly critical of DOD's *noncompliance* with both the act and the HEW regulation concerning vending machine income sharing.[62]

Just as the colloquy was ineffective to amend the language of the bill, the subsequent letters were ineffective to amend the language of the statute.

In sum, the legislative history of the act reveals its sweeping purpose to combat the "widespread, major abuses" of the blind vendor program and to double the number of blind vendors on all federal property. DOD alone was characterized as "singularly insensitive" and "hostile or indifferent" to the program. DOD was criticized not only for its abuses of blind vending stands but specifically for the military exchanges' use of

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61. *Badeau v. United States* 21 Ct. Cl. 48, 49-50 (1886); *See United States v. Philadelphia Nat'l Bank*, 374 U.S. 321, 348-49 (1963); *Waterman S.S. Corp. v. United States*, 381 U.S. 252, 268-69 (1965). *See also Key Buick Co. v. Commissioner*, 68 T.C. 178, 183 (1977), *aff'd*, 613 F.2d 1306 (5th Cir. 1980).

62. *1979 Oversight Hearings* at 93. The majority also discounts the testimony and letters from the GAO in connection with the 1979 Oversight Hearings, in which GAO found that the DOD regulation was inconsistent with the statute as well as with the authorized HEW regulations. Finally, the majority reverses the well-reasoned decisions of the arbitration panel and of the Claims Court.

vending machines to compete with blind vendors.[63] The amendments were adopted to protect the blind from the military exchanges and not vice versa.

HEW Interpretation

Congress expressly stated its desire and reason for regulatory supremacy in HEW:[64]

> The Committee finds that there is a record of abuses and neglect of the Randolph-Sheppard program by officials of various Federal agencies that is adequate to justify the placement of increased overall authority for its operation with the Secretary of Health, Education, and Welfare. ***
>
> * * * * *
>
> The Committee believes that the Department of Health, Education, and Welfare should be the overseer of the Randolph-Sheppard program throughout the Federal government. As such, it is inevitable that there will be some incursion by that department in matters traditionally handled by other agencies. The Department of Health, Education, and Welfare, however, has the expertness and the sensitivity to the problems inherent in the blind vendor program which may be lacking in other agencies. If the program is to be coordinated, well run and consistent, it must have a coordinator. The only possible choice for this function is HEW.

Congress acted on the committee's recommendations by granting both broad and specific powers to *HEW* alone. Thus, *HEW* shall prescribe regulations to assure the priority for blind vendors (including income sharing "to achieve and protect such

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63. *See Texas State*, 6 Cl. Ct. at 733 n.6.

64. S. REP. NO. 937, 93d Cong., 2d Sess. at 16, 19 (1974).

priority").[65] *HEW* shall prescribe regulations establishing one or more vending facilities on all federal property.[66] "A determination made by the Secretary [of *HEW*] pursuant to this provision shall be binding on any department, agency, or instrumentality of the United States affected by such determination."[67]

HEW shall "make annual surveys of concession vending opportunities for blind persons *** particularly with respect to *** the Department of Defense."[68] *HEW* shall convene arbitration panels to decide disputes under the Randolph-Sheppard Act.[69]

Finally, and most significantly:[70]

> The Secretary [of *HEW*] shall take such action and promulgate such regulations as he deems necessary to assure compliance with this section [concerning vending machine income sharing].

Given the statute and the express statements of Congress, the majority's conclusion that HEW is "only on a par with DOD" in promulgating regulations under the act is surprising, to say the least.

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65. 20 U.S.C. § 107(b) (1982). The functions under the Randolph-Sheppard Act which were administered by the Secretary of HEW are now administered by the Secretary of Education. 20 U.S.C. § 3441 (1982). For the purposes of this opinion, I will continue to refer to HEW because the regulations in question were promulgated by HEW rather than by Education.

66. 20 U.S.C. § 107(b) (1982).

67. *Id.*

68. 20 U.S.C. § 107a(a) (1982). The only other reference to DOD in the act is that "Federal property" is defined to include DOD property. 20 U.S.C. § 107e(3) (1982). DOD is *not* "charged with enforcing" the act. Actually, DOD is not given any authority whatsoever under the act. *Cf. United States v. Riverside Bayview Homes, Inc.*, 106 S. Ct. 455, 461 (1985).

69. 20 U.S.C. §§ 107d-1, 107d-2 (1982).

70. 20 U.S.C. § 107d-3(g).

For two reasons, the majority misplaces its reliance on Executive Order No. 12,146,[71] which only states that if two *executive agencies* disagree on the interpretation of a statute, they may submit the dispute to the Attorney General "*prior to proceeding in any court*" (emphasis supplied). First, the Department of Justice is not allowed to issue a ruling on a matter already in litigation.[72]

Thus, in *Oklahoma v. Weinberger,*[73] the Department of Justice was not functioning in the neutral position that the Tenth Circuit assumed. As the letter upon which DOD bases it argument clearly states, the issue reached the Department of Justice only *after* suit was filed in Oklahoma. The Department of Justice was already functioning as the Government's lawyer in response to pending litigation against the United States. The Department of Justice was merely advising its client not to take any action that would compromise the litigation in progress. The Department of Justice thus issued no formal opinion, nor could it have under federal law, because the matter was under litigation.

The majority errs in stating that Justice's interpretation in litigation is binding. The United States is always a party in the Claims Court, where it is represented by the Department of Justice. Under the majority's analysis, the Department of Justice could issue a binding ruling in every case, and there would be no need for a Claims Court.

Second, it is inaccurate for the majority to suggest that conflicting regulations of two agencies are entitled to equal weight, without regard to the statutory authority of the agencies. Here, the respective authority of HEW and DOD can be determined only in reference to the act, which overwhelmingly rejects the majority's assertion that the agencies are "only on a par."

The majority criticizes the HEW regulation because it merely

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71. Exec. Order No. 12,146, 3 C.F.R. 409 (1980).

72. *See, e.g.*, 38 Op. Att'y Gen. 149 (1934); 37 Op. Att'y Gen. 34 (1932); 32 Op. Att'y Gen. 472 (1921).

73. *Oklahoma*, 741 F.2d at 293.

"repeat[s] the statutory language." In my view, a better basis for disregarding a regulation of the authorized agency would be if the agency did *not* follow the statute.[74] Furthermore, the fact that HEW did not find it necessary to depart from the statutory language, stating that only an amendment by Congress could effect such a change, is a powerful indication that the statute was clear and unambiguous.

The majority states that "there is no basis for deference to the interpretation by HEW" because HEW has "vacilated internally." A close reading of the majority opinion, however, discloses the fact that HEW published its final regulation on March 23, 1977, and *HEW has never changed or withdrawn* this regulation.

Advocates for DOD wrote letters attempting to prevail upon HEW to change its regulation. It is this flurry of correspondence which the majority describes as evidence of "internal vacillation." If the correspondence proves anything, it is that HEW carefully considered the views of DOD as well as the language of the statute before it promulgated its regulations. This initial correspondence was never promulgated or published, but even if it had been, it would not be sufficient to undermine HEW's credibility. The United States Supreme Court has recently explained:[75]

> The fact that the agency has from time to time changed its interpretation of the term "source" does not, as respondents argue, lead us to conclude that no deference should be accorded the agency's interpretation of the statute. An initial agency interpretation is not instantly carved in stone. On the contrary, the agency, to engage in informed rulemaking, must consider varying interpretations and the wisdom of its policy on a continuing basis. ***

When it became clear to DOD that HEW would not change its regulations, DOD acted upon HEW's advice and

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74. *See Northern Colo.*, 730 F. 2d at 1517.

75. *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 863-64 (1984).

attempted to introduce legislation to amend the Randolph-Sheppard Act to delete the words "within retail sales outlets." DOD's legislative proposal was not acted on, however, and the statutory exemption remained unchanged.

Undaunted, DOD proceeded to publish its own final regulations exempting *all* vending machines "operated by or for the military exchanges."[76] DOD acknowledged comments disagreeing with its version of the exemption, but it refused to change the DOD regulation.[77]

The majority "conclude[d] that the interpretation of DOD, as the agency compelled to apply the statutory exemption, is the only authoritative administrative construction."[78] Clearly, the majority has erred.

Conclusion

The majority has rewritten a clear statute despite its plain meaning, the legislative history supporting that plain meaning, and the interpretation of the authorized agency. Thus, DOD has accomplished through the courts what it was unable to accomplish in the legislature or in the executive branch.

I would affirm the judgment of the United States Claims Court.

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76. 43 Fed. Reg. 25,337-42. DOD's actions are inconsistent with its argument of ambiguity. Query: If the statute contained any support for DOD's interpretation, why was DOD so vigorous in attempting to change the statute and the HEW regulation which tracked the statute? Why did DOD promulgate its own regulation instead of simply withholding the income under the statute and the HEW regulation as written?

77. *Id.* at 25,339.

78. The majority misplaces its reliance on *Riverside Bayview Homes*, 106 S. Ct. at 461, since Congress charged HEW and not DOD with enforcing the statute. Thus, it is HEW's regulation which is entitled to deference.

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

TEXAS STATE COMMISSION FOR THE BLIND AND STATE OF TEXAS, *Appellees,*	)	
v.	)	Appeal No. 85-1954
THE UNITED STATES, *Appellant.*	)	

NEWMAN, *Circuit Judge,* with whom SMITH, Circuit Judge joins, dissenting.

I generally agree with Judge Smith's opinion in dissent, and offer the following additional remarks.

Both sides of this issue pose questions that are inappropriate for judicial answer, yet answer we must. The literal words of the statute, on which Judge Smith's opinion turns, are challenged by the fact that DOD has apparently never implemented those words; this in turn is balanced by the contrary reading of the statute by HEW (the agency charged with administering the statute). The 10th circuit has held one way, and the Texas arbitrators (split 2-1) and the Claims Court held the other way. The legislative history can support both interpretations, as the preceding opinions demonstrate at length.

No fundamental law of nations or peoples is at stake; rather, at stake is the choice of Congress on how to aid both the blind and military recreation. This is a decision of national policy, and it cries for the voice of Congress, not a court's conclusion that Congress did not intend the legislation that it enacted.

Until that voice is heard, I conclude that the balance is on the side of the position supported by Judge Smith. This result does not require explaining away the plain words of the statute, as is eloquently done by the majority of the court. I find it anomalous to conclude that the House and Senate* believed that the simple clause "within retail sales outlets" really means "anywhere on the base". Although the government has cited precedent for judicial rewrite of acts of Congress, none of this authority goes as far as the dramatic rewrite advanced by the court.

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*The House voted 398 for, 7 against, and the Senate 90 for, 1 against, to override President Ford's veto.

APPENDIX B

IN THE UNITED STATES CLAIMS COURT

No. 132-83C

(Decided November 26, 1984)

THE TEXAS STATE COMMISSION FOR THE BLIND AND STATE OF TEXAS	)
v.	)
THE UNITED STATES	)

OPINION

MEROW, *Judge.*

Introduction

This case comes before the court on cross-motions for summary judgment. Reply briefs have been filed and oral argument has been held.

Plaintiff, Texas State Commission for the Blind (TSCB), seeks enforcement of an arbitration decision holding defendant, the United States, liable for monies unlawfully withheld under the income-sharing provisions of the Randolph-Sheppard Act (Act). 20 U.S.C. §§ 107-107f (1976). Plaintiff claims damages in excess of $10 million. Defendant argues the Act's "military exemption," 20 U.S.C. § 107d-3(d), exempts it from liability.

Background of the Randolph-Sheppard Act

The Randolph-Sheppard Act, 20 U.S.C. §§ 107-107f, was passed in 1936, Pub. L. No. 732, ch. 638, 49 Stat. 1559. Its purpose was to provide the blind with remunerative employment and greater economic opportunities. Sec. 1, 49 Stat. at 1559. The legislation permitted blind persons licensed under the Act to set up vending stands in federal buildings. No priority or preference was given in approving licenses. H.R. Rep. No. 1094,

74th Cong., 1st Sess. 1, 2 (1936). Rather, the legislation was designed merely to create employment opportunities for the blind on federal property and to further federal rehabilitative efforts on behalf of the blind. *Id.*

In 1954, it appeared the program was not as effective as it might be, in large measure, because of competition from the new technological advance and rapid proliferation of vending machines. 100 Cong. Rec. 9895 (statement of Sen. Gore), 9940 (statement of Rep. Barden), 9949 (statement of Rep. Rhodes) (1954). Congress strengthened the program by passing the Randolph-Sheppard Act Amendments of 1954. Sec. 4(a), Pub. L. No. 83-565, ch. 655, 68 Stat. 652, 663-65. The amendments authorized a preference, where feasible, allowing blind vendors to set up vending stands on federal property. *Id.* This preference was assured by assigning vending machine income to the blind. *Id.* Blind vendors would receive all income from vending machines which were in direct competition.[1]

In 1969, additional amendments were proposed. The legislation was introduced because of the weak showing in the number of blind vendors operating on federal property,[2] the growing trend toward installation of vending machines and the exclusive use of machines in some federal buildings, as well as increasing use of vending machine income by federal employees for recreation and welfare purposes. S. 2461 was designed to protect the blind preference established in the 1954 amendments.

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1. The Secretary of Health, Education and Welfare (HEW) was charged with authority to issue regulations necessary for the operation of the program. 68 Stat. at 663. The implementing regulation provided "for the assignment to the [blind] operator of the income from vending machines within reasonable proximity to and in direct competition with the vending stand. (If a vending machine vends articles of a type authorized by the [blind vendor's] permit and is so located that it attracts customers who would otherwise patronize the vending stand, such machine shall be considered to be in reasonable proximity to and in direct competition with the stand.)" 45 C.F.R. § 403.6(c) (1957).

2. A comparison of blind vending stands on federal and nonfederal installations shows that in fiscal year 1969 there were 836 stands on federal property employing 972 blind persons and that there were 1984 stands on nonfederal property employing 2287 persons. S. Rep. No. 1235, 91st Cong., 2d Sess. 2 (1970).

S. Rep. No. 1235, 91st Cong., 2d Sess. 2 (1970). The bill provided for exclusive assignment of vending machine income to the blind (or to the state licensing agencies administering the Randolph-Sheppard Act) There were no exemptions for any agency or vending machine. The exclusive income assignment was implemented to facilitate the purpose of the Act, to provide maximum new job opportunities for the blind. *Id.* [3]

In August 1972 Congress requested the General Accounting Office (GAO) to review vending operations on federally-controlled property and to determine if blind vendors were receiving a preference as required by the 1954 amendments. The report[4] included a specific investigation of property under the control of the Department of Defense (DOD), the United States Postal Service (USPS), and the General Services Administration (GSA). It was a major catalyst for enacting the 1974 amendments. S. Rep. No. 937, 93rd Cong., 2d Sess. 9 (1974), S. Rep. No. 1297, 93rd Cong., 2d Sess., *reprinted in* 1974 U.S. Code Cong. & Ad. News 6373 , 6397.

The report concluded that the program was languishing at the federal level while flourishing at the state level and in the private sector. GAO found that not only had little attention been paid to the blind vendor program, but that major abuses had occurred.[5] GAO concluded that, insofar as DOD compliance was concerned, military officials had not been "recep-

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3. S. 2461 passed the Senate on September 28, 1970, 116 Cong. Rec. 33936 (1970), but was returned to the Committee on Education and Welfare on September 29, 1970. 116 Cong. Rec. 34241 (1970).

4. "Review of Vending Operations On Federally Controlled Property," Report to the Senate Subcommittee on the Handicapped, Committee on Labor and Public Welfare, B-176886 (Sept. 27, 1973)" (hereinafter "GAO Report").

5. For instance, the parent Defense Department association at a major federal space installation demanded blind vendors give a portion of their income to the association. This was precisely the reverse of the 1954 amendment requirements. S. Rep. No. 937, 93rd Cong., 2d Sess. 10 (1974). In another instance, federal employees boycotted a blind vendor because he made modest price increases on some items to meet rising costs. *Id.* at 10-11.

tive" to establishing blind vendor stands.[6] In addition, GAO found that DOD regulations implementing the Act provided that no permits would be granted to blind vendors for the operation of vending stands if morale and welfare programs would be placed in jeopardy. These programs were funded by vending machine revenues. 32 C.F.R. § 260.4(b) (3) (ii) (1966).[7]

The 1974 legislation created a "priority" for blind vendors in establishing and operating vending facilities on federally-controlled property. 20 U.S.C. § 107(b). This priority included a "prior right" to do business once the vending facility had been established. S. Rep. No. 937, *supra*, at 15. In addition, the committee stated that the legislation is directed toward the establishment and protection of blind vending opportunities. *Id.*

Absent from the 1974 legislation was the exclusive assignment of vending machine income to blind vendors provision present in the 1969 bill, s. 2461, *supra*. In its place an income-sharing formula was established. A blind vendor or state licensing agency would share 100 percent of the income of vending machines directly in competition with the blind vending facility, or a 50 or 30 percent share of vending machines not in direct competition with the blind vending facility. Sec. 107d-3(b) (1). In addition, unlike S. 2461 proposed in 1969, the 1974 Act had three exemptions from the income-sharing requirements.[8] The

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6. GAO visited six major military installations and the Pentagon. There were 5,984 vending machines on the installations, all of which were operated by nonblind vendors. Of 56 stands, four were operated by the blind. *GAO Report*, at 25. The four blind vendors had individual incomes ranging from $4,000 to $16,000 and received no income from competing machines as required by 45 C.F.R. § 403.6(c) (1957). *Id.* at 27.

7. DOD regulations provided for income sharing only if there was "unreasonable" or "unfair" competition from vending machines operated by nonblind vendors. 32 C.F.R. § 260.4(c); *GAO Report* at 26. This resulted in few blind vendor stands on DOD property. In fiscal year 1972 only 46 of 878 stands on federal property were located on DOD property. *Id.* at 27.

8. The Act states that the income-sharing provisions "shall not apply to income from vending machines within retail sales outlets under the control of exchange or ships' stores systems authorized by Title 10, or to income

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first exemption, the "military exemption," is at issue in this case.

The 1974 Act also contained a new provision providing for arbitration if a complaint was filed with the Secretary of HEW[9] by a blind licensee, or by a state licensing agency, 20 U.S.C. § 207d-2, 34 C.F.R. § 395.13(a) (1982), 34 C.F.R. § 395.37(a) (1982). An arbitration panel would be comprised of three members. The statute provided one panel member to be designated by each party and the third member to be jointly chosen. 20 U.S.C. §§ 107d-2(b). The arbitration is conducted as a formal hearing. *Id.* § 107d-2(a). The panel's decision is final and binding on the parties, subject to judicial review under chapter 7 of the Administrative Procedures Act (APA), 20 U.S.C. § 107; 34 C.R.F. §§ 295.13(c), 395.37(b) (1982).

Factual Background

Plaintiff, Texas State Commission for the Blind, a state licensing agency, 20 U.S.C. § 107b, filed a complaint with the Secretary of HEW alleging DOD failed to comply with the income-sharing provisions of the Randolph-Sheppard Act. Pursuant to 20 U.S.C. § 107d-2, an arbitration panel was convened by the HEW Secretary on January 29, 1981. The dispute stems from differing interpretations of the military exemption, 20 U.S.C. § 107d-3(d). This exemption states that the income-sharing provisions "shall not apply to income from vending machines within retail sales outlets under the control of exchange or ships' stores systems authorized by Title 10." In its implementing regulations, 32 C.F.R. §§ 260.1-260.6 (1982), DOD broadly construed the exemption as applying to "income from vending machines operated by or for the military exchanges or ships' stores systems." 32 C.F.R. § 260.3(D) (3)(i) (1982). The

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from vending machines operated by the Veteran Canteen Service, or to income from vending machines not in direct competition with a blind vending facility at individual locations, installations, or facilities on Federal property the total of which at such individual locations, installations, or facilities does not exceed $3,000 annually." 20 U.S.C. § 107d-3(d).

9. All duties of the Secretary of HEW under the Randolph-Sheppard Act were transferred to the Secretary of Eduation. Pub. L. No. 96-88, Title VI, Oct. 17, 1979, 93 Stat. 696.

Secretary of HEW, who is charged with the authority to carry out the provisions of the Act, 20 U.S.C. § 107a, and with the responsibility to assure compliance with the income-sharing provisions, 20 U.S.C. § 107d-3(g), interpreted the exemption as excluding "income from vending machines within operated retail sales outlets under the control of post exchange or ships' stores systems authorized under Title 10 of the U.S.C." 34 C.F.R. § 395.32(i) (1982).

At the arbitration proceeding, plaintiff argued in favor of HEW's interpretation of the exemption. Plaintiff contended since HEW is charged with implementing the Randolph-Sheppard Act, its interpretation of the exemption should be given great deference. Plaintiff also argued that the plain reading of the statute favors a narrow interpretation. Plaintiff contended that defendant's interpretation would provide a blanket DOD exclusion from the Act. TSCB also argued that the legislative history on which DOD relied, was ambiguous and unreliable evidence of congressional intent. Plaintiff also contended that DOD's unsuccessful attempts to obtain new legislation endorsing its interpretation of the exemption is strong evidence that DOD's interpretation is inconsistent with the purpose of the existing legislation. Finally, plaintiff contended that any overlap of the military exemption with the $3,000 exemption, 20 U.S.C. § 107d-3(d), should be discounted.

Defendant argued that the military exemption is ambiguous and that the legislative history should be consulted. Defendant relied primarily on the Brademas-Sikes colloquy[10] and Senate

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10. "Mr. SIKES. Mr. Speaker, first let me congratulate my distinguished friend, the gentleman from Indiana (Mr. Brademas), and his committee for an important legislative accomplishment. This is a good bill and a needed bill.

"Mr. Speaker, I do seek clarification on one point. I have discussed this with the distinguished gentleman, and let me ask a question.

"In section 7(d) of the amended act (section 206 of H.R. 14225), there is a statement that the income-sharing provisions as they pertain to vending machines 'within the retail sales outlets under the control of exchange or ship's store's systems authorized by title 10,' shall not apply. I would presume, and I would like the distinguished subcommittee chairman to verify for the record, that this provision exempts from the revenue-sharing plan all those

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Report No. 937, *supra.*[11] DOD contended that the military exemption includes vending machines other than those within retail sales outlets because the $3,000 exemption is sufficient to exempt the latter. Defendant argued that if only the machines within the retail sales outlets were exempt, Congress would have created a meaningless exemption. Lastly, DOD maintained that the income-sharing provisions were directed at vending machine competition from civilian employee groups rather than at military personnel.

The arbitration panel reviewed the legislative history of the Act and issued its decision on September 2, 1981. A majority concluded that the military exemption applies only to vending machines actually inside the four walls of retail stores. The panel reasoned that since Congress unquestionably intended

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vending machines which are operated by the militay post exchanges, Navy exchanges, officer and enlisted messes, and so forth.

"As you are aware, the profits from these vending machines are utilized by the services to finance such worthwhile endeavors as the base libraries, the youth activities, the gymnasium, and other sports activities, hobby sports and motion picture programs, ashore and afloat. The servicemen finance these programs themselves through the revenues collected in the retail sales outlet systems as I have mentioned. To require that these revenues be shared might well necessitate the appropriation of additional funds for the defense budget. Since work in the fiscal year 1975 defense appropriations bill has been completed, the effect would be to cut off these needed programs without support.

"Would the gentleman confirm for me the fact that it is the intent that this paragraph shall not apply to the military services, and that this is in keeping with the language on page 24 of the Senate report. (S.Rep. No. 93-937) which is more specific on this issue tha[n] is the conference report?

"Mr. BRADEMAS. Mr. Speaker, I thank the gentleman from Florida for his fine remarks about this legislation. I am pleased to tell the gentleman that the answer to both his questions is 'Yes.' " 120 Cong. Rec. 35712 (Oct. 16, 1974).

11. The pertinent section of Senate Report 93-937 reads as follows:

"Subsection (d) exempts certain activities from vending machine income assignment. Both military exchange systems and the Veterans Canteen Service operate under specific statutory authority, and are thus, as a matter of policy, excluded." S. Rep. No. 937, 93rd Cong., 2d Sess. 24 (1974).

the Act to greatly enhance economic opportunities for the blind, the exceptions must be read narrowly. The panel directed DOD to reimburse plaintiff for all income due since the effective date of the 1974 amendments. Plaintiff estimates this sum to be in excess of $10 million.

Plaintiff commenced this action to enforce the arbitration award. Defendant argues the arbitration decision is invalid as a matter of law and seeks judicial review of the decision. Plaintiff argues that since review of the award is controlled by chapter 7 of the Administrative Procedures Act, 5 U.S.C. §§701-06, defendant cannot challenge the award. In addition, an array of jurisdictional issues have been raised. These include the basis for the court's jurisdiction, the accrual of the statute of limitations, the proper scope of review of the arbitration decision and whether the nonappropriated fund doctrine deprives the court of jurisdiction.

For the reasons stated below, it is concluded that this court has jurisdiction to determine the validity the monetary arbitration award and that the arbitration panel correctly interpreted the Act.

Discussion

Jurisdiction

Jurisdiction over the claim is based on 28 U.S.C. § 1491. The Tucker Act, of course, is itself only a jurisdictional statute; it does not create any substantive right enforceable against the United States for money damages. *United States v. Testan,* 424 U.S. 392, 398 (1975). The Act merely confers jurisdiction whenever the substantive right exists. *Mitchell v. United States,* 445 U.S. 535, 538 (1980). Plaintiff's claim for money damages must be based on another statute. In this case, plaintiff's right is based on 20 U.S.C. §§107d-1 and 197d-2(b) requiring the implementation of the arbitration award obtained on its monetary claim. As such, the statute of limitations commences to run from the date of the arbitration decision. *United Parcel Service, Inc. v. Mitchell,* 451 U.S. 56 (1981).

Had plaintiff chosen not to arbitrate,[12] it could

12. Arbitration under the Randolph-Sheppard Act is voluntary. 20 U.S.C. § 107d-1 provides:

"(a) Any blind licensee who is dissatisfied with any action arising from the operation or administration of the vending facility program *may* submit to a state licensing agency a request for a full evidentiary hearing, which *shall* be provided by such agency in according with Section 107b(6) of this title***.

"(b) Whenever any state licensing agency determines that any department *** is failing to comply with the provisions of this chapter or any regulations thereunder *** such licensing agency *may* file a complaint with the Secretary who *shall* convene a panel to arbitrate." (Emphasis added.)

See also 34 C.F.R. § 395.13(a) (1982); 34 C.F.R. § 395.37(a) (1982). In comparing the permissive language allowing an arbitration request with the mandatory language requiring arbitration only after such a request, it becomes clear arbitration is not mandatory. *See Oklahoma v. Weinberger,* No. Civ.-81-928-7 (W.D. Okla. 1982), *aff'd,* No. 83-1258 (10th Cir. 1983); *contra Fillinger v. Cleveland Society for the Blind,* 587 F.2d 337 (6th Cir. 1978); *Mass. Elected Committee of Blind Vendors Matava,* 482 F. Supp. 1186 (D. Mass. 1980); *Texas State Commission for the Blind,* Civil No. A-84-CA 214 (W.D. Tex., Sept. 28, 1984).

The decision in *Oklahoma* supports this result. The court implied that the blind licensee or agency has a choice whether to arbitrate or to seek judicial relief directly. The court stated:

"The Randolph-Sheppard Act provides for arbitration of a state licensing agency's complaint regarding a federal department or agency's failure to comply with the provisions of the act or any regulations issued pursuant to it. Plaintiff filed an arbitration complaint more than a year ago with the Department of Education but has not obtained a decision and does not anticipate one will be rendered due to the recalcitrance of the Department of Defense. The defendant has not objected to the Court's consideration of this issue and accordingly, under these circumstances, plaintiff will not be required to exhaust its administrative remedies."

Slip Op. at 2, n. 2.

The decisions in other jurisdictions requiring prior arbitration are not persuasive. In *Texas* the court stated arbitration was mandatory and provided no reasoning for its decision. In *Fillinger* the court reasoned the amendments to the Randolph-Sheppard Act allowing arbitration reflected a congressional policy "that blind vendors must exhaust their administrative and arbitration remedies before seeking review in the district court." 587 F.2d at 338.

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then have instituted a suit for money wrongfully withheld pursuant to 20 U.S.C. § 107d-3. The court would have jurisdiction over such a claim. *See Eastport Steamship Corp. v. United States,* 178 Ct. Cl. 599, 605, 372 F.2d 1002, 1007 (1967). Under these circumstances the statute of limitations would then have commenced to run within a reasonable time after the statutory payment obligation arose. *See Nager Electric Co. v. United States,* 117 Ct. Cl. 234, 368 F.2d 847 (1966).

However, because plaintiff did elect arbitration and suit was filed within six years of the arbitration decision, the statute of limitations does not bar enforcement of this decision despite the fact that the sums involved commenced to accrue as early as 1974.

Plaintiff argues defendant is precluded by the APA from attacking the arbitration decision. 20 U.S.C. § 107d-2(a) provides the arbitration decision "shall be subject to appeal and review as a final agency action for purposes of chapter 7 of such Title 5."[13] 5 U.S.C. § 702 provides: "A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof." A person is defined as "an individual, partnership, corporation, association, or public or private organization other than an agency." 5 U.S.C. § 551(2). Plaintiff argues that defendant cannot challenge the arbitration award because it is not a person under the APA.[14]

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The court in *Massachusetts Electric* found this reasoning persuasive and followed *Fillinger.* From the language of the statute, however, it appears Congress simply provided blind vendors with the option to pursue an additional avenue of relief rather than mandated prior arbitration in each instance. In addition, there is no indication in the legislative history that Congress intended to impose arbitration as a prerequisite to judicial relief. *See generally* 1974 U.S. Code Cong. and Ad. News, p. 6373.

13. Plaintiff's argument that the arbitration is final and not reviewable by this court must be rejected. According to 20 U.S.C. § 107d-2(a), this court may review the decision within the scope of review provided by 5 U.S.C. § 706.

14. This argument has been rejected by the one other court which has ruled on the issue. *Georgia Department of Human Resources v. Bell,* 528 F. Supp. 17, 22 (N.D. Ga. 1981) (*amended on other grounds,* Apr. 16, 1982).

In harmonizing the reference to the APA in the Randolph-Sheppard Act with this court's jurisdiction, it is necessary to reject plaintiff's argument that defendant cannot seek review of the arbitration decision. For the purpose of suits maintained in the Claims Court, this section must be interpreted to incorporate only the review provisions of 5 U.S.C. § 706. Such a result is necessary because this court is without jurisdiction to enforce chapter 7 in its entirety. 5 U.S.C. § 705 sets forth equitable remedies beyond the jurisdiction of this court. In addition, the Administrative Procedures Act is not a substantive statute for jurisdictional purposes. *See,* Brenner, *Judicial Review By Money Judgment in the Court of Claims,* 31 Fed. Bar J. 179, 183-85 (1961); *Califano v. Sanders,* 430 U.S. 99, 107 (1977).

The United States is always a party before the court. To argue that only the plaintiff may challenge an arbitration decision would lead to an inequitable result.[15] There is a strong bias in favor of review of administrative action. *See Barlow v. Collins,* 397 U.S. 159, 166-67 (1970); *Abbott Laboratories v. Gardner,* 387 U.S. 136, 139-143 (1967). It is likely that the intent of the legislation was to allow limited review of the award by request of either party in a court otherwise have subject matter jurisdiction.

This result is supported by the legislative history. The early provisions of what was to become the 1974 amendments provided that only blind persons and state licensing agencies had the right to judicial review. The language limiting review only to non-governmental entities was eliminated before passage of the 1974 amendments.[16] In addition, had Congress intended

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15. The present situation is unlike *S & E Contractors, Inc. v. United States,* 406 U.S. 1 (1972). In the present case there is no contractual provision prohibiting judicial review. In addition, unlike the contract disputes systems as construed in *S & E,* arbitration is not akin to a compromise procedure.

16. The language of the provisions as proposed in Senate Bill 2461, introduced in 1969, and Senate Bill 2506, introduced in 1971, was as follows:

"Sec. 10. Notwithstanding other provisions of this Act, *any blind person or State licensing agency* suffering legal wrong because of any agency action, or adversely affected or aggrieved by such action within the meaning of this Act or other relevant statutes, *shall be entitled to* and shall have

(footnote continued on next page)

to limit the government's right to review, it could have explicitly so provided in the statute. *Compare* 5 U.S.C. § 7703(d); *Devine v. Nutt,* 718 F.2d 1048, 1052 (1983).

Finally, although we are dealing with nonappropriated funds, 28 U.S.C. § 2517 does not deprive the court of jurisdiction. Although the nonappropriated fund doctrine may be a limiting factor in the court's jurisdiction, it does not deprive this court of jurisdiction if appropriate funds may be used to fund the agency. *United States v. General Electric Corp.,* 727 F.2d 1567, 1570 (1984); *L'Enfant Plaza Properties, Inc. v. United States,* 229 Ct. Cl. 278, 668 F.2d 1211 (1982); *McCarthy v. United States,* 229 Ct. Cl. 361, 670 F.2d 996 (1982). A judgment need not be satisfied from the permanent judgment fund. 31 U.S.C. § 1304. A judgment in this case is in the nature of a refund and could be satisfied from defendant's Morale Welfare and Recreation Account as well as O&M appropriations. *See* GAO Report B-211206 (Sept. 27, 1984). Thus, we are not faced with the difficult question which would be presented were exercise of the Claims Court's judgment owner sought to provide additional appropriated sums under 28 U.S.C. § 2517, 31 U.S.C. 1304, in lieu of nonappropriated funds unlawfully retained and utilized by an agency. In such an instance, absent some indication that prior congressional approval existed for bypassing the legislative appropriation process, the Constitutional prohibition set forth in Article 1, § 9, cl. 7, might well apply. *See Great Western Ins. Co. v. United States,* 19 Ct. Cl. 206, *affirmed,* 112 U.S. 193 (1884); *United States v. Richardson,* 418 U.S. 166 (1974).

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standing for *judicial review* thereof." (Emphasis added.) The language proposed in Senate Bill 2581, which was later to become a part of the 1974 amendments was:

"Sec. 7. (b) Whenever any State licensing agency, designated as such by the Secretary under this Act, determines that any department, agency, or instrumentality of the United States that has control of the maintenance, operation, and protection of Federal property is failing to comply with the provisions of this Act or any regulations issued thereunder such licensing agency may file a complaint with the Secretary who shall convene a panel to arbitrate the dispute pursuant to section 6 of this Act, and the decision of such panel shall be *final and binding on the parties except as otherwise provided* in this Act. (Emphasis added.)

No such problem would arise were suit brought in a tribunal having the equitable jurisdiction to compel a refund of withheld sums.

Merits

The issue presented in this case is one of statutory construction. Under the APA, questions of law are fully reviewable by courts. 5 U.S.C. § 706; *North Georgia Building & Construction Trades v. Goldschmidt,* 621 F.2d 697, 708 (5th Cir. 1980); *Coca-Cola Co. v. Atchinson,* 608 F.2d 213, 218 (5th Cir. 1979); *General Ry Signal Co. v. Washington Metropolitan Area Transit Authority,* 527 F. Supp. 359, 360 (D.C. D.C. 1979), *aff'd,* 664 F.2d 296, *cert. denied,* 452 U.S. 915 (1981).

In determining the meaning of a statute, the first inquiry must be directed to the statute's language. If the language is plain, the duty of interpretation does not arise and the function of the courts is limited to enforcing the statute according to its own terms. *Caminetti v. United States,* 242 U.S. 470, 485 (1917). 2A Sands, *Sutherland Statutory Construction,* § 46.01 (4th ed.). When a statute is plain and unequivocal on its face, there is no need to resort to legislative history. *United States v. Oregon,* 366 U.S. 643, 648 (1961). However, when enforcement of the literal interpretation of a statute leads to "absurd" results such that a literal view would impute to Congress an irrational purpose, *United States v. Bryan,* 339 U.D. 323, 338 (1950), or would thwart the obvious purposes of the statute, *In Re Trans Atlantic Pipeline Rate Cases,* 436 U.S. 631, 643 (1978), or would lead to an "unreasonable" result plainly at variance with the policy of the legislation as a whole, *Trustee of Indiana University v. United States,* 223 Ct. Cl. 88, 94, 618 F.2d 736, 739 (1980), literal interpretation will be eschewed in favor of a more flexible inquiry into legislative intent. 2A Sands, Sutherland Statutory Construction, § 46.07. Thus, if a statute's text is unclear or ambiguous and its words do not readily provide a plain meaning, a literal approach is unhelpful and it is appropriate to resort to legislative history. *United States v. Oregon,* 366 U.S. at 648; *Fitzpatrick v. Internal Revenue Service,* 665 F.2d 327, 329-30 (11th Cir. 1982).

a) The Statute

i) Customary Meaning

The statutory provision at issue appears unambiguous on its face.[17] The disputed phrase is "vending machines within retail sales outlets under the control of exchange or ships' stores systems." The term "within," a preposition, is defined as "used as a function word to indicate enclosure or containment," Webster's Third New International Dictionary (1967 ed.), and "in or into the interior of or the parts or space enclosed by," Random House Dictionary of the English Language (1967 ed.), or may mean "the inside of a place, space or building." *Id.* The common usage of the term contemplates spatial boundaries. Defendant's assertion that "within" may also mean "subject to" or "a part of" broadens its meaning and eliminates the connotation of spatial contraints. This strains the ordinary meaning of this term and must be avoided. 2A Sands, *Sutherland Statutory Construction*, § 46.01. The customary meaning of the term favors plaintiff's assertion that Congress intended to exempt vending machines located within physical boundaries, *i.e.*, retail stores.

Similarly, the term "outlet" is undefined in the statute. Unless Congress has clearly indicated a contrary meaning, its ordinary meaning is favored. *United States v. Snider*, 502 F.2d 645, 651 (4th Cir. 1974). The term "outlet" has a common, everyday meaning of "a market for a commodity," "a retail store," Webster's Dictionary, *supra*, or "a store, merchant or agency selling one's goods." Random House Dictionary, *supra*. The ordinary and customary purport of the term "outlet" favors plaintiff's interpretation that the exemption applies to retail stores rather than to vending machines.

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17. Both HEW and GAO have maintained that the "plain meaning" of the exemption should prevail and that inquiry into legislative history is unnecessary. Memorandum to Leo Corbett, Special Assistant to the Secretary of HEW from Richard Beattie, Acting General Counsel of HEW (Apr. 12, 1977); Memorandum from Milton J. Socolar, General Counsel, GAO, to Director, Federal Personnel and Compensation Division, B-183894-O.M. (Feb. 26, 1979) (hereinafter "Socolar Memorandum").

Defendant argues for an interpretation which would exempt all vending machines under the control of military exchanges or ships' stores systems. It would read the retail sales outlet limitation out of the statute and would render the phrase "within retail sales outlets" meaningless. Defendant's interpretation would ignore a limitation in the statute. Basic principles of statutory construction militate against this practice. Effect should be given, where possible, to every word of a statute so that no part will be rendered nugatory, superfluous, void or insignificant. 2A Sands, *Sutherland Statutory Construction*, § 46.06; *Ricker v. United States*, 184 Ct. Cl. 402, 396 F.2d 454 (1968).

ii) HEW's Interpretation

Under § 107d-3(g) of the Act, the Secretary of HEW is charged with authority "to take such action and promulgate such regulations as he deems necessary to assure compliance" with the income-sharing provisions of the statute. This language has been construed as granting "broad rulemaking powers." *Blum v. Bacon*, 457 U.S. 132, 140, n. 8 (1982). The legislative history indicates that Congress intended to confer broad authority on HEW to carry out the Randolph-Sheppard Act. Congress viewed HEW as having the "expertness and sensitivity to the blind vendor program which may be lacking in other agencies." S. Rep. No. 937, 93rd Cong., 2d Sess. 19 (1974). HEW was considered to be the only possible choice for coordinating the blind vendor program on federal property. *Id.*

It is axiomatic that an interpretation of a statute by an administrative body charged with its implementation is accorded great weight as an extrinsic aid in the interpretation of statutes by the courts. 3 Sands, *Sutherland Statutory Construction*, § 65.05; *United States v. Clark*, 454 U.S. 555, 565 (1982). HEW has consistently construed the military exemption as applying only to vending machines within the four walls of retail outlets.[18]

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18. *See* Notice of Proposed Rulemaking on December 23, 1975, 40 Fed. Reg. 59408. 40 Fed. Reg. 549414 (Dec. 23, 1975) (proposed rules); 42 Fed. Reg. 15814 (Mar. 23, 1977) (final rules); 45 C.F.R. § 1369.32(i) (1980); 34 C.F.R. § 395.32(i) (1982).

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iii) Statutory Scheme

The statute reveals a congressional desire to ensure DOD compliance. For instance, Congress provided for a survey of vending opportunities afforded blind vendors on federal property. The statute requires particular scrutiny of opportunities on DOD, GSA and the Postal Service property. 20 U.S.C. § 107a-(a)(2). This emphasis was not present in earlier legislation. Its inclusion in the 1974 amendments highlights increased congressional concern for the program's development on these properties. DOD's interpretation of the exemption would severely restrict blind vendor opportunities on DOD property and the survey provision would be rendered meaningless.

In addition, the text of the statute demonstrates that Congress could create unambiguously a blanket exemption from the income-sharing provisons. Congress exempted without limitation "income from vending machines operated by the Veteran's Canteen Service." The military exemption does not contain similarly broad language.

Defendant argues that if plaintiff's interpretation is adopted, the military exemption would duplicate the $3,000 exemption. Defendant reasons that all vending machines within retail sales outlets are already covered by the latter exemption. The $3,000 exemption was a compromise provision intended to mollify *non*-DOD federal employees who strenuously opposed the blind vendor program. Socolar Memorandum, *supra*, at 6. There is no evidence that Congress considered the overlapping nature of the two exemptions. Arbitration Panel's Decision at 14, n. 22. In addition, although vending machines within retail sales outlets of the exchanges may have produced income of $3,000 or less in 1978 and qualified as exempt under two exemptions,

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Defendant points to draft regulations considered, but subsequently rejected, by HEW in April 1975. These reflect defendant's interpretation of the exemption. Defendant views the inconsistent interpretation as undermining HEW's longstanding narrow interpretation and argues less judicial deference which should be accorded to HEW's interpretation. *See also Oklahoma v. Weinberger*, No. 83-1258, slip op. at 4-5 (10th Cir. 1983). The fact that HEW *rejected* the broader interpretation of the exemption, however, is significant. Arbitration Panel Decision at 17.

it is entirely probable that Congress anticipated that the vending machine income would exceed $3,000 in the future.

b) Legislative History

Even if the exemption is ambiguous and legislative history is consulted, defendant's interpretation is not persuasive. Although defendant's position is supported by selected excerpts of legislative history, it is not supported by the Act as a whole.

Defendant relies very heavily on two excerpts of legislative history. The portion of Senate Report No. 937,[19] which defendant cites as exempting the "military exchange systems" from income-sharing includes other references to the same exemption. These excerpts support a narrower interpretaton. The report states:

> Subsection (d) provides that the assignment of income provisions of subsections (a) and (b)(1) do not apply to vending machine income from military exchange retail outlets ***.

Report at 21.

> Subsection (d) excludes from application of this section [the income-sharing provisions] vending machine income from retail outlets of military exchanges ***.

Report at 30.

The text of the Report cited by defendant is ambiguous when read in conjunction with contrary references in other sections of the same document.

Furthermore, the Conference Report, which is more persuasive of congressional intent than committee reports, *Demby v. Schweiker,* 671 F.2d 507, 510 (D.C. Cir. 1981), describes the exemption as excluding vending machines in "certain locations" from income-sharing. This suggests that individual retail

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19. *See* n. 11.

outlets are within the exemption but that vending machines in multiple locations are excluded. S. Rep. No. 93-1270, 93rd Cong., 2d Sess. 35 (1974) and H.R. Rep. No. 93-1457, 93rd Cong., 2d Sess. 35 (1974).

Defendant maintains that the most persuasive evidence of congressional intent is the Brademas-Sikes colloquy of October 16, 1974.[20] *See also Oklahoma v. Weinberger,* No. 82-1258, slip op. at 6 (Oct. 19, 1983). Rep. Brademas was a floor manager of the 1974 legislation and the chairman of the House Subcommittee that sponsored the bill (H.R. 14225). Although remarks made by a member of a committee in charge of a bill are generally considered in construing the enacted legislation, such statements are not given effect to override a clear and unambiguous meaning conveyed by the statutory language. 2A Sands, *Sutherland Statutory Construction,* ¶ 48.14. Here, the interpretation is at odds with the statutory language as well as the ordinary meaning of the phrase "within retail sales outlets." Therefore, the dialogue is less significant in determining congressional intent. Even GAO described the dialogue as "isolated statements of individual legislators" and rejected it as unpersuasive in view of the clear statutory language and countervailing legislative history. Socolar Memorandum at 2. the colloquy's significance is further diminished by the fact that it occurred on the House floor several weeks *after* the Senate passed the legislation and several days *after* the Senate unanimously agreed to the Conference Report. S. Rep. No. 1297, 1974 U.S. Code & Ad. News at 6377. *Weinberger v. Rossi,* 456 U.S. 25, 35 (1982); *Consumer Product Safety Commission v. GTE Sylvania, Inc.,* 447 U.S. 102, 117-18 and n.13 (1980). Clearly, one cannot say that the Senators who voted for the language in issue did so with any understanding of the meaning reflected in this subsequent colloquy. *See Aparacor, Inc. v. United States,* 215 Ct. Cl. 596, 604, 571 F.2d 552, 556 (1978).

More importantly, the Brademas-Sikes colloquy pales in significance when viewed in conjunction with the remaining legislative history. Congress was greatly concerned that competition from automatic vending machines threatened to suffocate the blind vendor program. S. Rep. No. 937, *supra,* at 10.

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20. *See* n.10.

The legislative history is replete with congressional concern for the failure of the program on DOD property. Congress found that military installation commanders were "singularly insensitive" to the need to develop the program, *id.* at 10, and that they were either "hostile or indifferent to the program." *Id.* at 17. These attitudes hampered the program development and led to the insignificant number of blind vendors of DOD property.[21] In fact, DOD was described as a "virtual monolith of opposition" to the Randolph-Sheppard program. 121 Cong. Rec. 16228 (1975).

Defendant's insistence that the income-sharing provisions were directed at the civilian sector and not at military personnel and their programs is not supported by the legislative history. Rather, Congress stressed uniform application of the Randolph-Sheppard Act by *all* federal officials. Rep. Perkins, House manager of the legislation, specifically stated that the legislation was not "directed to any one Federal activity more than any other." 120 Cong. Rec. 35710-11 (1974). In fact, Congress singled out a Marine Corps supply base in Albany, Georgia for its exemplary compliance with the Randolph-Sheppard program. S. Rep. No. 937, *supra*, 17. There were five blind vendors operating snack bars and cafeterias on the base. Congress expressed the hope that the DOD would "use the experience of the Albany, Georgia facility as a 'model' for all Defense installations." *Id.*

Since a majority of vending machines on DOD-controlled property are operated by the post exchange systems of the various services, *GAO Report, supra*, at 28[22] an exception from

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21. As of 1974, the Defense establishment reported 9 blind vendors at Air Force facilities, 17 on Army posts and 16 at Navy bases. S. Rep. No. 937, *supra*, at 10.

22. For instance, virtually *all* vending machines on Marine Corps installations are operated by the exchange systems. Memorandum to Tom Lewis, Office of Management and Budget, from Clare Moelk, Assistant Director, Personnel Administration and Services, Department of Defense (May 12, 1978). As a representative of GAO testified before the Subcommittee on the Handicapped (Hearings Before the Subcomm. on the Handicapped of the Senate Committee on Labor and Human Resources, 96th Cong., 1st Sess. 4 (1979) (Statement of H.L. Kreiger, Director, Federal Personnel and Com-

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income-sharing for all such machines would result in little or no opportunity for blind vendor employment on DOD installations. This interpretation would frustrate the congressional purpose that the Randolph-Sheppard Act be "one of the most practical and effective employment opportunities ever enacted by Congress." S. Rep. No. 937, *supra*, at 13.

Courts owe a duty to avoid where possible the effective nullification of a statute. *Hardee v. United States*, 708 F.2d 661 (Fed. Cir. 1983) (Markey, Chief J., dissenting).

Conclusion

An examination of the legislative history, coupled with the plain meaning of the statutory language, renders defendant's view of the exemption unpersuasive.

Accordingly, it is ORDERED:

(1) Defendant's motion for summary judgment is denied;

(2) Plaintiff's cross-motion for summary judgment on the issue of liability is granted;

(3) The matter is remanded to the arbitration panel for determination of the amount involved, as required by 20 U.S.C. § 107d-2(b);

(4) Following a final decision as provided by (3), the Secretary of Defense shall take such action as may be necessary to provide for prompt payment of any amount so determined to be due and owing, as required by 20 U.S.C. § 107d-2(b);

(5) Final judgment shall be entered as stated above and, except for the relief so granted herein, plaintiff's complaint shall be otherwise dismissed;

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pensation Division, GAO)), of the estimated 43,952 vending machines operated by the Army & Air Force Exchange Services, 43,372 machines would be exempt if DOD's interpretation were adopted. The remaining 580 would be exempt under the $3,000 provision.

(6) Absent payment, within a reasonable time, of any amount found to be due by the arbitration panel pursuant to (3)-(4), upon motion by plaintiff, pursuant to Rule 60(b) (6), the instant matter shall be reinstated on the docket of the court for further appropriate action;

(7) Alternately, given the recurring nature of the dispute and the contrary decision in *Oklahoma v. Weinberger, supra*, it is concluded that, to the extent the ruling herein constitutes an interlocutory order, the matter involves a controlling question of law with respect to which there is a substantial ground for difference of opinion, and immediate appeal from the order entered herein may materially advance the termination of the litigation. Accordingly, this opinion is certified for immediaate interlocutory review, pursuant to 28 U.S.C.A. § 1292(d)(2) (West Supp. 1984), should either party seek such appeal.

IN THE UNITED STATES CLAIMS COURT

No. 132-83 C

THE TEXAS STATE COMMISSION
FOR THE BLIND AND THE
STATE OF TEXAS

v. JUDGMENT

THE UNITED STATES

Pursuant to the opinion of November 26, 1984, denying defendant's motion for summary judgment and granting plaintiff's cross-motion for summary judgment on the issue of liability,

IT IS ORDERED AND ADJUDGED this date, pursuant to Rule 58, that the matter is remanded to the Secretary of the Department of Education for determination of the amount involved, as required by 20 U.S.C. § 108d-2(b), following a final decision, the Secretary of Defense shall take such action as may be necessary to provide for prompt payment of any amount so determined to be due and owing, as required by 20 U.S.C. § 107d-2(b) and except for the relief so granted herein, the complaint is otherwise dismissed.

Frank T. Peartree
Clerk of Court

By: /s/

Deputy Clerk

NOTE: As to appeal, 60 days from this date, see FRAP 4(a)

APPENDIX C

IN THE MATTER OF ARBITRATION	•	
between	•	
THE TEXAS STATE (TEXAS STATE COMMISSION FOR THE BLIND), Complainant	•	RS 79-4
and	•	
THE DEPARTMENT OF DEFENSE, Respondent	•	

I. STATUTORY BACKGROUND

The Randolph-Sheppard Act (Act)[1] was originally passed in 1936 to authorize the operation of blind vending stands in federal buildings. The Act has been amended twice. In 1954[2] the authorization for blind vendors to operate in federal buildings was changed to give blind vendors a "preference" in establishing new stands and to extend coverage to include federal lands as well as federal buildings. The 1954 amendments dealt, as well, with vending machines placed in federal buildings by non-blind entities[3] which effectively competed with blind vending stands.[4]

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1. 20 U.S.C. §§107 et. seq.

2. 68 Stat. 663.

3. These entities included employee groups of all types and, on military establishments the various civilian groups and military exchanges.

4. § 107 of the Act provided in part:

> ...The head of each department or agency ... shall ... prescribe regulations designed to assure such preference (including assignment of vending machine income to achieve and protect such preference) for such licensed blind persons ....

No assignment of income regulations were promulgated pursuant to this power.

In 1969 Senator Randolph began efforts to amend the Act again. In addition to introducing bills each year beginning with 1969, hearings were held before the House Select Subcommittee on Education of the Committee on Education and Labor in 1970 and before the Senate Subcommittee on Handicapped Workers of the Committee on Labor and Public Welfare in 1971 and 1973. S 2581, which contained amendments to the Act, was passed by the Senate on June 20, 1974. To allow for quick House consideration, these amendments were added as Title II of § 3108. (This bill contained amendments to the Rehabilitation Act.) In conference, the House version of the amendments to the Rehabilitation act were accepted and the Senate version of the amendments to the Randolph-Sheppard Act were accepted and the combined bill was numbered HR 14225. This bill was passed by the Senate and the House. HR 14225 was returned to Congress by the President because of objections to Title I dealing with the amendments to the Rehabilitation Act. In November of 1974 Congress overrode the President's veto. However, since the President indicated that his veto was a "pocket veto" not subject to being overriden, § 4194 and HR 1750, both identical to HR 14225, were introduced in the Senate and the House. HR 17503 (1974 Amendments) passed both houses on November 26, 1974 and was signed by the President on December 4, 1975.[5]

The 1974 Amendments contained significant changes in the Act. Some of these changes were: to convert the blind vendor's "preference" to a "priority,"[6] to increase the items to be sold by the blind vendors,[7] to allow a blind person to operate vending facilities not merely vending stands,[8] to require a determination as to whether an appropriate vending site exists in any newly purchased, leased, or renovated federal building and

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5. Pub. L. 93-516; 88 Stat. 1517. It was later determined by a Federal District Court that the President's action was a veto, not a pocket veto and had been properly overriden.

6. 20 USC § 107(b).

7. 20 USC § 107a(a) (5).

8. 20 USC § 107e(7).

to give state blind agencies input into that determination,[9] to create an arbitration mechanism for disputes,[10] and to provide for a sharing of income from non-blind operated vending machines by blind vendors or state blind agencies.[11] This sharing of income from non-blind operated vending machines is on a sliding scale. 100% of the income from these machines accrues to the blind vendor or the state agency when there is direct competition with a blind vending facility. 50% of such income is allocated to the state agency when there is no direct competiton unless at least half of the hours worked on the premises where the machines are located are outside normal working hours. In the latter case, the share allocated to the state agency is 30%. The state agency uses this money to provide such things as pension plans, health insurance, sick leave and vacation pay for blind vendors.[12]

The Act as amended by the 1974 Amendments, contains two exemptions from this income sharing provision. These are set out in Section 107d-3(d) which provides:

> Subsections (a) and (b) (1) of this section shall not apply to income from vending machines within retail sales outlets under the control of exchange or ships' stores systems authorized by Title 10, or to income from vending machines operated by the Veterans Canteen Service, or to income from vending machines not in direct competition with a blind vending facility at individual locations, installations, or facilities on Federal property the total of which at such individual locatons, installations, or facilities does not exceed $3,000 annually.

The first exemption relating to exchange or ships' stores systems is the subject of this proceeding.

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9. 20 USC § 107a.

10. 20 USC § 107d-1 and 107d-2.

11. 20 USC § 107d-3.

12. 20 USC § 107d-3(c).

The Department of Health, Education and Welfare (HEW) has made responsible for implementation of the Act including the promulgation of regulations. After much discussion between agencies which will be discussed below, final regulations were promulgated on March 23, 1977 as 45 C.F.R. Part 1369 (HEW Regulations). Part of the HEW Regulations provided the following relating to the exemptions:

> The provisions of this section shall not apply to income from vending machines within operated retail sales outlets under the control of post exchange or ships' stores systems authorized under Title 10 of the United State Code; to income from vending machine operated by the Veterans Canteen Service; or to income from vending machines not in direct competition with a blind vending facility at individual locations, installations, or facilities on Federal property the total of which at such individual locations, installations or facilities does not exceed $3,000 annually.[13]

There had been substantial dispute between HEW and the Department of Defense (DOD) as to the extent of the military exchange exemption. This dispute was in part reflected in the Supplementary Information to the Regulations published in the Federal Register. HEW stated:

> An exemption from the vending machine income distribution requirements has also been requested in the case of vending machines located in officer or enlisted men's messes in Department of Defense intallations. This request has been made on the basis that specific provisions in Title 10 of the United States Code vest the military service Secretaries with responsibilities for, and requisite authority necessary to conduct, the various affairs of the military services, including functions necessary or appropriate for the "welfare" of the service or personnel involved, and vending machine income has been one of the major

13. 45 C.F.R. 1369.32(i).

> sources utilized over the years to generate the nonappropriated funds necessary for the welfare of service personnel. Although there is this indirect linkage of officer and enlisted masses to Title 10 of the United States Code, the Randolph-Sheppard Act Amendments of 1974 do not provide any basis for the military service messes to be exempt from the income sharing provisions. The Randolph-Sheppard Act clearly and specifically limits exemptions from the income sharing requirements to systems authorized under Title 10 of the United State Code or operated by the Veterans Canteen Service.
>
> While the Act does not permit exclusion of military service messes from the vending machine income sharing provisions, the legislative history on this matter appears to indicate that some members of Congress believed—these messes to be covered by the exemption granted to those systems authorized under Title 10 of the United States Code. This matter has been thoroughly reviewed with Department of Defense personnel and it is recognizd that resolution of this issue will require enactment of statutory clarification. The regulations have not been revised therefore in this regard.[14]

On June 12, 1978, over the objections of HEW, DOD issued regulations to implement the Act as to facilities under DOD's jurisdiction.[15] In Section 260.3(3) the DOD regulations provide:

> These vending machine income-sharing requirements do not apply to:
> (i) Income from vending machines operated by or for the military exchanges or ships' stores systems...

In arriving at its position as to the scope of the military exchange exemption, DOD relied on the legislative history of the

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14. 42 FR 15807 (Mar. 23, 1977).

15. 32 C.F.R. Part 26, 43 FR 25339 (June 12, 1978). These regulations were made effective retroactively to April 7, 1978.

1974 Amendments.[16] Two portions of that legislative history require full quotation. The first appeared in Senate Report 93-937 which was the main Congressional Report on the 1974 Amendments. It stated:

> Subsection (d) exempts certain activities from vending machine income assignment. Both military exchange systems and the Veterans Canteen Service operate under specific statutory authority, and are thus, as a matter of policy, excluded.[17]

The second piece of legislative history is a part of a discussion on the floor of the House between Congressman Brademas who was chairman of the House Select Education Subcommittee which had jurisdiction over the 1974 Amendments,[18] and Congressman Sikes who was chairman of House Armed Services Committee. (Brademas-Sikes Colloquy):

> Mr. BRADEMAS. Mr. Speaker, I am pleased to yield such time as he may consume to the gentleman from Florida.
>
> Mr. SIKES. Mr. Speaker, first let me congratulate my distinguished friend, the gentleman from Indiana, and his committee for an important legislative accomplishment. This is a good bill and a needed bill.
>
> Mr. Speaker. I do seek clarification on one point. I have discussed this with the distinguished gentleman, and let me ask a question.
>
> In section 7(d) of the amended act (section 206 of H.R. 14225), there is a statement that the income-sharing

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16. See Supplementary Information to DoD final Regulations 42 FR 25339 (June 12, 1978).

17. Page 24.

18. It should be noted, however, that no hearings were held on the Randolph-Sheppard Amendments in 1974 by this Subcommittee. The exemption provision was added in executive session.

provisions as they pertain to vending machines "within the retail sales outlets under the control of exchange or ships' store's systems authorized by title 10," shall not apply. I would presume, and I would like the distinguished subcommittee chairman to verify for the record, that this provision exempts from the revenue-sharing plan all those vending machines which are operated by the military post exchanges, Navy exchanges, officer and enlisted messes, and so forth.

As you are aware, the profits from those vending machines are utilized by the services to finance such worthwhile endeavors as the base libraries, the youth activities, the gymnasium, and othe sports activities, hobby shops and motion picture programs, ashore and afloat. The servicemen finance these programs themselves through the revenues collected in the retail sales outlet systems as I have mentioned. To require that these revenues be shared might well necessitate the appropriation of additional funds for the defense budget. Since work in the fiscal year 1975 defense appropriations bill has been completed, the effect would be to cut off these needed programs without support.

Would the gentleman confirm for me the fact that it is the intent that this paragraph shall not apply to the military services, and that this is in keeping with the language on page 24 of the Senate report [S. Rept. No. 93-937] which is more specific on this issue that [n] is the conference report?

Mr. BRADEMAS. Mr. Speaker, I thank the gentleman from Florida for his fine remarks about this legislation. I am pleased to tell the gentleman that the answer to both his questions is "Yes."[19]

II. ARBITRATION BACKGROUND

In May of 1979 the office of the Attorney General of the State

19. Congressional Record House, H 10604 (Oct. 16, 1974).

of Texas filed a complaint with HEW against the DOD on behalf of the Texas State Commission for the Blind (TSCB) alleging DOD's failure to pay over vending machine income as required under Section 107d-3 of the Act. The TSCB requested that an arbitration panel be convened to resolve the dispute. Arbitration is provided for under Section 107d-1(a) and Section 1369.37 of HEW's Regulations. In addition, this request complied with the "Revised Interim Policies and Procedures for Convening and Conducting an Arbitration Pursuant to Section 5(b) and 6 of the Randolph-Sheppard Act as Amended" issued by the Commissioner of Rehabilitation Services Administration on February 3, 1978.

On July 3, 1979 HEW approved the complaint of the TSCB and authorized the convening of a panel. TSCB designated Durward McDaniel as its arbitration panel member. The DOD designated Wilton B. Persons, Jr. These panel members selected Paul Barron as the panel chairperson. It should be noted that Rehabilitation Services Administration has now been transferred to the Department of Education.

A pre-arbitration meeting was held on October 9, 1980 at which the arbitration panel and counsel for the parties were present. At that time a Pre-arbitration Memorandum was signed by the parties and accepted by the panel. Pursuant to the Pre-Arbitration Memorandum the parties submitted a joint compendium of exhibits (Exhibits) and filed pre-arbitration briefs. The DOD also filed a pre-arbitration reply brief. On January 29, 1981 the arbitration hearing was held in New Orleans, Louisiana and a transcript was taken. The TSCB filed a post hearing memorandum.

III. ARGUMENTS OF THE PARTIES

A. Texas State Commission for the Blind

The TSCB argues initially that the plain language of the Act should control. Congress clearly limited the exemption "to income from vending machines within retail sales outlets." Further, TSCB contends that this meaning has been reinforced by the HEW Regulations. According to TSCB, great difference should be given to HEW's interpretation since it was the agency

chosen by Congress to implement the Act. In addition, TSCB argues that the legislative history should be ignored because the reference relied on by DOD are either unclear or contain errors making them suspect. TSCB also contends that given the purpose of the Act, to provide job opportunities for the blind, a total exemption of this income would make no sense. TSCB argues as well, that the overlapping nature of the $3,000 exemption should be ignored in that it was intended to be a broad exemption and it is only happenstance that it also covers the exchange income. Finally, TSCB points to the failure of the DOD attempts to obtain new legislation favoring its position as evidence of the Congressional intent.

B. The Department of Defense

The DOD argues that the exemption is ambigous rather than clear and therefore reference must be made to the legislative history to determine the Congressional intent. In that regard, the DOD contends that Senate Report 93-937 and Brademas-Sikes Colloquy properly set forth the Congrssional intention to fully exempt vending incomes from machines operated by the military exchange systems. DOD argues that the inconsistencies in this legislative history should be ignored particularly in light of the fact that the Brademas-Sikes Colloquy was between two House members who were particularly knowledgeable in this area. Further, DOD points to the fact that under the TSCB interpretation the exemption would have little effect since the $3,000 exemption already exempts most of the vending machine income within the military exchange retail outlets. DOD argues, therefore, that Congress would not have intended to create a useless exemption. Finally, DOD contends that the vending machines income sharing provisions were included to protect the blind vendors from competition by civilian employee groups that had set up vending machines for social and welfare activities and not to reduce the income for the programs which benefited military personnel.

IV. DISCUSSION AND FINDINGS

It is clear that this case is one of statutory interpretation.[20]

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20. At an early state of this proceeding DOD took the position that an ar-

(footnote continued on next page)

The Act exempts "... income from vending machines within retail sales outlets under the control of exchange or ships' stores systems authorized by Title 10." Taken on its face, the statute does not, in fact, appear to be ambiguous. The normal understanding of "within retail sales outlets," the crucial phase, is that the vending machine must be inside the four walls of an exchange system store for its income to be exempt. It is true, as DOD argues, that the word "within" can have other meanings including "a part of." However, this meaning is hard to support when placed in juxtaposition with the phrase "retail sales outlets." Nor is it possible to focus simply on the phrase "under the control of" without effectively reading out of the statute the balance of the language.

Further, the limited nature of the exemption language is reinforced by comparison with the words used to exempt the Veterans Canteen Service vending machine income. This language, which immediately follows the exemption for the military exchanges, is unmodified in any way, thus, clearly applying to all vending machines operated by Veterans Canteen Service. This strongly indicates that the drafters of the legislation knew how to draft a broad exemption provision and therefore intended a more limited exemption for military exchanges by using the modifiers "within retail sales outlets."

(footnote continued from previous page)
bitration panel under the Act is not authorized to resolve a dispute which is solely one of statutory interpretation. Section 107d-1(b) of the Act provides:

> Whenever any State licensing agency determines that any department, agency, or instrumentality of the United States that has control of the maintenance, operation, and protection of Federal property is failing to comply with the provisions of this chapter or any regulations issued thereunder (including a limitation on the placement or operation of a vending facility as described in section 107(b) of this title and the Secretary's determination thereon) such licensing agency may file a complaint with the Secretary who shall convene a panel to arbitrate the dispute pursuant to section 107d-2 of this title, and the decision of such panel shall be final and binding on the parties except as otherwise provided in this chapter.

All members of this panel agree that the statute authorizes resolution of this dispute by arbitration. However, DOD by participating in the proceeding does not waive its objection to the panel's jurisdiction.

Nevertheless, it is not possible, in good conscience, to resolve this dispute upon the face of the statute where there is legislative history which indicates, as it does in this case, that Congress may have intended a result different than what appears to be the plain language of the statute. Arguably the legislative history itself raises questions as to the clarity of the language.

The only Congressional discussion of this particular section of the 1974 Amendments is the Brademas-Sikes Colloquy. Both Representative Brademas and Representative Sikes were knowledgeable individuals regarding this legislation and its effects on the military. It is obvious from their exchange that they believe this exemption applied to all income from vending machines operated by the exchange systems. Even if one discounts this evidence somewhat because these Congressman also included vending machines operated by "officer and enlisted messes", coverage clearly not contemplated by the statutory language, it is still substantial evidence of Congressional intention. This legislative history favorable to DOD's position is further reinforced by Senate Report 93-937, presumably available to all members of Congress that voted on the 1974 Amendments. This report, while incorrect as to its rational,[21] unmistakably indicates that all income from vending machines operated by the exchange system is exempt. It should be noted, further, that DOD's inability to convince Congress to pass an amendment making clear the broad nature of the exemption is not helpful in assessing Congressional intention since HEW and its successor, the Department of Education, has, through the Office of Management and Budget, effectively blocked this legislation from being considered by Congress.

In addition, such a broad exemption is not unreasonble. The exemption section can be viewed as responding to two separate concerns. The $3,000 annual income exemption was a compromise intended to respond to the complaints of numerous employee groups, most importantly the postal workers, who

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21. The Senate Report states that the military exchange systems "operate under specific statutory authority." While the Secretary of Defense is authorized by Title 10 to establish activities to promote the welfare of the military and pursuant to that authority established the military exchange system, there is no specific statutory authorization for the exchange system.

had established vending machines on federal property to further social and welfare employee activities. This exemption protected a portion of that income. The military exchange system and Veterans Canteen Service exemption was most certainly intended to protect programs for the military which were being provided through these revenues without the need of appropriations from the federal government. In effect, this latter exemption was intended to reduce federal revenues which would have to be substituted to maintain these programs for military personal. Considered in this context, a full, rather than partial, exemption of this revenue would be reasonable.[22]

What results from the foregoing evidence is seemingly plain language on the one hand which supports the position of the TSCB and substantial legislative history on the other hand which favors the view of the DOD. What ultimately resolves this balance in favor of the more limited exemption asserted by the TSCB is the general intent and approach of the legislation itself. These factors argue for a narrow reading of any limitation on opportunities for the blind.

As noted above, the overall thrust of the 1974 Amendments was to increase dramatically the benefits blind persons could drive from the Randolph-Sheppard Program. In particular, the 1974 amendments sought to insure greater work opportunities

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22. DOD's argument that the combination of these exemptions also reinforces the legislative intent to create a broad exemption is unconvincing. According to DOD all of the income from machines located inside the four walls of the retail sales outlets is exempt under the $3,000 exemption. Hence, the narrow reading of the exchange exemption would produce a nulity unintended by Congress. The difficulty with this argument is two-fold. First, given the nature of these exemptions, one for a specific group and one which is general, it is not surprising that there should be overlap. It is simply happenstance that the overlap is complete. There is no evidence that Congress was aware of the overlap. Such evidence would have supported DOD's position. Rather, in including the $3,000 exemption Congress was basically focusing in on exempting income of vending machines operated by governmental employees and not its effect on exchange vending machine income. Second, what may be exempt today under the $3,000 exemption may not be covered in the future either because the income from the machines grow beyond $3,000 or direct competition arises. Finally, part of the value of the $3,000 exemption may well be lost as well by an interpretation of "individual locations, installations, or facilities" which combines larger numbers of vending machines.

for blind vendors by changing from a preference to a priority and to ensure that appropriate vending sites would be developed in all new or renovated federal installations. The income sharing provisions are, in part, a way of protecting the work opportunities that had been generated in the past and would be generated in the future and, in part, as a substitute for lack of adequate sites. The protection of work opportunities can be seen most clearly in the $3,000 exemption. That exemption applies only if there is no competition with a blind vendor. Further since the location can generate only $3,000 of income annually there would be little likelihood that it would be appropriate as a site for a blind vendor.[23]

With the broad exemption asserted by the DOD, potential work opportunities could be lost to blind vendors. For example, if no blind vendor was available at the time a building was built, leased or renovated that site opportunity would be lost forever by the installation of military exchange vending machines. Not only is the income sharing lost to the state agency, but there is no incentive to turn the facility over to a blind vendor at a later date. In addition, it is conceivable that in many places on military installations sites will not be available because of the nature of the area.[24] Here the income sharing, as a substitute for the work opportunity, would be lost to the blind as well.

It is unquestioned that the Congress, in general, intended the 1974 Amendments to greatly enhance the opportunities for the blind under the Act. That is the concept they voted on. While this may not have been the intention of Representatives Brademas and Sikes, the proper result in this case is to read the language, consistent with general intention to favor the blind and to limit the reach of any exception to this goal. This is particularly true where, as here, the language of the statute,

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23. The Veterans Canteen Service exemption is similarly of limited impact on site opportunities for blind vendors since, according to the parties, its operation is relatively small.

24. The Act provides that sites for blind vendors may be limited if it can be shown that such placement would "adversely affect the interests of the United States." See Section 107(b) of the Act and Section 1369.30 of the HEW Regulations.

which is what the whole of Congress voted upon, clearly supports this limited meaning for the exemption.

The final support for the narrow exemption lies in the HEW Regulations. While this panel is not bound to apply the standard of review found in the Administrative Procedure Act[25] certainly substantial weight should be given to the view of the agency chosen by Congress to implement the Act. At the outset of the rulemaking process DOD proposed, and HEW considered, the broad exemption of income from all vending machines operated by the military exchange systems. This approach was ultimately rejected by HEW. The basis for this rejection must, in part, be based on HEW interpretation of the statutory language *and* a belief the income that would be diverted from the blind was important to achieve the goals under the Act.[26]

Based on all of the above, a majority of this panel finds that the exemption set forth in Section 107d-3(d) of the Act for "income from vending machines within retail sales outlets under the control of exchange or ships' stores systems" means

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25. 5 U.S.C. § 806(2)(A). But see, Randolph-Sheppard Vendors of America, Inc. v. Harris, 628 F.2d 1364, 1366 (D.C. Cir. 1980).

26. While it is impossible to determine what percentage of income of the full military exchanges system would be lost to morale, welfare and recreation programs of the military, DOD in a position paper dated December 20, 1978, which it sent to the General Accounting Office estimated a net income loss from the Army and Air Force Exchange Service (AAFES) of $1,686,552 in 1978 (See page 48 of Exhibit III-M). DOD stated that this represented 13.3% of projected net income from AAFES vending machines but did not indicate what percentage this amount represented of the total net income AAFES from all sources. The AAFES net income for 1978 was stated to be $13 million. A May 12, 1978 memorandum from Clare A. Moelk Assistant Director, Personnel Administration and Services, DOD to Tom Lewis, Office of Management and Budget (Exhibit II-G4) indicated that vending machine income represented 15% of all AAFES net income. If one divides $13 million by 15%, the total income for AAFES in 1978 would have been approximately $86.7 million. $1,686,552 represents approximately 2% of that figure.

It should be noted, however, that this amount would be substantially higher were it not for the fact that an overwhelming number of AAFES vending machines, which would not fall under the military exchange exemption, are exempt under the $3,000 limitation. (See page 47 of Exhibit III-M)

only vending machining actually inside the retail stores[27] and *not* to all vending machines operated by the exchange or ships' stores systems. DOD is, therefore, directed to reimburse the TSCB for all income due consistent with this meaning since the effective date of the 1974 Amendments.

/s/

Paul Barron,
Panel Chairperson

/s/

Durward McDaniel,
Panel Member, Concurring

Dated: September 2, 1981.

27. This panel expressly does not include the issue of whether vending machines directly outside retail sales outlets are to be deemed inside or outside these stores.

Dissenting Opinion

I. The Issue.

The Randolph-Sheppard Act was extensively amended in 1974. Only one amendment is involved in this case, the so-called "income-sharing" provision. This section requires that, with certain exceptions, the income from all vending machines on Federal property shall accrue to any blind vendor operating on that Federal property or, if there is no blind vendor, to the State agency for the blind. This unusual arrangement was mandated by Congress because of evidence that certain Federal agencies were allowing the purpose of the Act (namely, to provide job opportunities for blind vendors) to be evaded by the use of vending machines to operate income for civilian employee welfare programs. Hence, what amounts to a forfeiture of the income from those machines was imposed by legislative fiat.[1]

There is no question that the Randolph-Sheppard Act and the 1974 amendments apply to the Department of Defense. The Department of Defense is now providing new opportunities for blind vendors. It is processing applications for vending facilities and is look for new ways to broaden blind vendors' participation on military bases.[2] The only issue is whether the income from vending machines operated by the military post and base exchanges must be forfeited to the State agencies for the blind or whether it was excepted by Congress from such forfeiture. The Department of Defense agrees that all other vending machines operated on military bases are subject to the "income-sharing" provisions, and is making payment of that income.[3]

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1. There was considerable opposition expressed to this Draconian solution during the hearings. A spokesman for the Post Office Department stated that employees of that Department would, in effect, be forced to subsidize the blind (p.104, Hearings before the Subcommittee on the Handicapped of the Senate Committee of Labor and Public Welfare, on s. 2581, 93rd Congress, 1973; Exhibit III F-1).

2. Testimony of Major General Umstead, p. 82-84, hearing before the Subcommittee or the Handicapped of the Senate Committee on Labor and Human Resources, 96th Congress, April 30, 1979; Exhibit III M-1; pp. 76-79, Transcript of Hearing in this Arbitration.

3. Testimony of Major General Umstead, *supra*; pp. 96-97, Transcript of Hearing in this Arbitration.

The military exchanges were authorized in their modern form by the Secretary of War in 1895,[4] and were first mentioned in Federal statutes in 1903.[5] For almost a century they have provided those in the armed forces of the United States convenient and reasonably priced comfort items and services. Any profits from their operation go to provide recreational facilities and morale and welfare services for service men and women. This arrangement has been recognized and approved by Congress many times through the years, as mutually beneficial to the soldier, who is charged with protecting the civilian, and to the civilian, who is responsible for supporting the soldier through payment of taxes.[6] Our service men and women are young, stationed far from home, and usually far from any civilian recreational facilities, even if they could afford to use them.[7] They must be provided with healthy, productive and wholesome things to do when they are off duty. Libraries, service clubs, craft shops, photo labs, auto repair facilities, gymnasiums, athletic equipment and clothing, picnic areas—these are paid for in large part by the profits from military exchanges.[8] Any reduction of income from the exchanges means a reduction in these services, as Congress has made it clear that it is unwilling to pay for those programs. Commanders and other responsible military leaders unanimously express the opinion that a reduction in these services and programs will adversely affect the morale, esprit, discipline and readiness to fight of the members of the armed forces.[9]

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4. General Order 46, July 25, 1895.

5. Act of March 2, 1903 (32 Stat. 927).

6. See extracts of Congressional Hearings and Reports, dated 1949, 1953, 1970, 1972, 1974, 1977, 1978, 1979, Exhibit III-N, attachments 2-1 through 2-21.

7. The average service man is an E-4 (Corporal) with a wife and one child. In 1979, he earned $10,709.10, *one half* of the average income for an American family of three. He comes close to qualifying for food stamps. Most married servicement below the rank of corporal do qualify for food stamps. (Exhibit III-N, p. 9).

8. Air Force Regulation 34-3, Exhibit III-N, Attachment 11.

9. Exhibits III-N, Attachments 12-1 through 12-25.

It has been suggested that prices in the exchanges be raised or that higher "user fees" be charged for participation in the morale and welfare programs.[10] That would mean simply that the money comes out of the pocket of the serviceman. To him, it could be a further erosion of his already low standard of living.

The Texas State Commission for the Blind argues that requiring the exchanges to share their vending machine income would only reduce the exchange income—and the morale and welfare activities—by a relatively small amount.[11] This implies that the Department of Defense is so large that it will never miss the income. That misses the point. It is not the Department of Defense who will suffer; it is the individual serviceman who will be hurt. There is no indication that Congress intended to adversely affect the soldier, sailor, airman or marine in any way. The evidence is all to the contrary.

II. The Statute.

The "plain language" of the statute turns out not to be so plain. According to the majority, the normal understanding of the words "within retail sales outlets" is that the vending machine must be within the four walls of an exchange system store for its income to be exempt. It is not difficult to come up with an entirely different understanding of the quoted words, and to do so without substituting a strained meaning for the word "within" or reading any part of the words out of the statute. The military exchanges are in the retail business—that is, they are engaged in selling goods at retail for profit. Therefore, all vending machines operated by exchanges become part of "retail sales outlets" when they are installed and supplied with goods and when customers begin to buy their wares—at retail. This is not the case with the Veterans Canteen Service, the other organization exempted from vending machine "income sharing." It is not in business—not operating "retail sales outlets" to make a profit. It is only providing a service in Veterans Hospitals, and its surplus income over expenses is required by

10. Page 63, Transcript of Hearing in this Arbitration.

11. Posthearing Memorandum, Texas State Commission for the Blind, February 13, 1981.

statute to be turned in to the Treasury.[12] This could explain the difference in language in the two exemptions. It is interesting to note that, during the hearings, the complainants admitted that the statutory language was imprecise and might require some regulatory elaboration.[13] The effect of reading the statute as the complainants would have us do cannot be ignored, either. Congress must have intended to enact some sort of exemption for military exchanges. The fact is that, because of the $3,000 annual income exemption, not one of the military exchange vending machines would be exempted. The majority finds this unpersuasive on the ground that the overlapping of the two exemptions is coincidental and that changing circumstances can change this result. However, even without considering the effect of the $3,000 annual income exemption, the majority reading of the military exchange exemption would exclude only 1.3% of the vending machines operated by the military exchanges.[14] It is unlikely that Congress intended such a minuscule effect.

In view of the circumstances surrounding the enactment of the military exchange exemption, it is not surprising that the language is unclear and imprecise. This small subsection was added in an executive session of the Senate subcommittee. There was apparently no opportunity for clarification or other input from the Department of Defense. According to the minutes of the executive session, the sole topic of discussion was the continuing controversy with the Postal unions over the civilian employee welfare funds. There is no mention of military exchanges in the minutes.[15]

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12. 38 U.S.C. 4201.

13. Page 32, 40-41, Transcript of Hearing in this Arbitration; the words "retail sales outlet" and "within" were both conceded to be susceptible of more than one interpretation. The majority would expressly leave the question open whether vending machines directly outside retail sales outlets are "within" for the purpose of the statute.

14. Exhibit III M-49.

15. Exhibit I J-3.

III. The Legislative History.

The majority finds that the legislative history supports the position of the Department of Defense that the military exchange exemption was intended to exclude all exchange vending machine income, citing the Senate Report, the Brademas-Sikes coloquy, and the different reasons for the $3,000 annual income exemption and the military exchange exemption. But, relying on the language of the statute and the general intent and approach of the 1974 amendments, they conclude that the military exchange exemption should be read narrowly, as advocated by the complainants.

As noted above, the language of the statute is not clear. The two specific references in the legislative history both clearly support total exemption of military exchange income. The Senate Report is straightforward and unambiguous in its statement that subsection (d) exempts all military exchange vending machine income from "sharing."[16] In the discussion on the floor of the House between Congressman Sikes and Congressman Brademas, Mr. Sikes specifically referred to that statement in the Senate Report and asked for and received from Mr. Brademas assurances that the Report meant what it said. Mr. Sikes had a legitimate reason for his question. As a member of the Appropriations Committee, he knew that it was too late to get appropriated funds to replace any exchange income lost through "sharing," and he did not want to see the armed forces recreational programs cut off without support. Mr. Brademas, of course, was the Chairman of the House subcommittee responsible for the 1974 amendments. As the majority point out, the $3,000 annual income exemption was a compromise to respond to complaints from civilian employee groups who wished to protect some of the income for their social and welfare activities.

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16. The majority suggest that the Report was incorrect in its rationale, because they state that the military exchanges do not operate under "specific statutory authority." In additon to the general authority given to the Service Secretaries under Title 10 (10 U.S.C. 3012, 5021, 8012), there have been many other Federal statutes enacted concerning the exchanges and their employees (Exhibit III N. Attachment 3, and especially 10 U.S.C. 4779). Therefore, there is no reason to cast any doubt on the Report, it s rationale, or its clear meaning and intent.

The military exchange exemption, on the other hand, was designed to protect military programs which Congress has approved and partially supported with appropriated funds.[17]

In the face of these strong and forthright expressions of Congressional intent, the majority nevertheless finds that the law means just the opposite. They do this based on their reading of the general purpose of the Act, and their belief that Congress's general intention to favor the blind should override the specific legislative history.[18] There is no question that Congress intended to expand opportunities for the blind. However, I do not believe they intended to do so at the expense of the individual members of the armed forces. I believe that Congress intended to exempt all military exchange vending machine income, and that this is a fair and reasonable balancing of the interests involved. Blind vendors will receive new opportunities for meaningful employment and will share in income from other vending machines on Federal property. At the same time, those charged with the defense of our country will not lose the morale and welfare support they need and deserve.[19]

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17. There are good reasons for the different Congressional treatment of civilian welfare funds and military welfare activities. No civilian employee of the Federal government makes such a commitment as the member of the armed forces. Unlike the civilian employee, the soldier gives up the right to live and work where he wants—he must go anywhere, at any time. He cannot quit his job. He is subject to the lawful orders of his superiors, and can be tried and imprisoned for disobeying them. He is expected to hazard his life, and if need be, die in the defense of this country.

18. The majority would also give some deference to the regulations implementing the Act which were issued by HEW, the agency responsible for overseeing the operation of the blind vendor programs. There are three reasons why this is inappropriate: (1) As an arbitration panel we are empowered and expected to decide this question *de novo,* not use the standard of judicial review; (2) Even a court would not defer to the agency where, as here, the question is solely one of statutory interpretation rather than one involving the expertise of the agency; and (3) HEW's regulations are singularly unhelpful anyway, as they merely repeat the statute almost word for word. This is in stark contrast with other sections of the Act, which have been the subject of pages of detailed HEW regulations.

19. The complainants and the member of the panel designated by the com-

(footnote continued on next page)

/s/

Wilton B. Persons, Jr.,
Panel Member, Dissenting

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plainants expressed during the hearings the fear that if military exchange vending machine income is exempted, the military authorities will avoid only income-sharing by having the military exchanges take over all other vending machines on military installations (p. 59, Hearing before this Arbitration panel). The Department of Defense representative appearing at the hearing responded in no uncertain terms that this would be inconsistent with the law and with the different missions of the military and civilian components and that the Department of Defense would not tolerate it (pp. 70-72, Hearing before this Arbitration panel; see also testimony of Major General Umstead, note 2, supra, to the effect that there can be expanded opportunities for blind vendors on military installations without displacing military exchanges or reducing military welfare funds.)